

05-614 NOV 11 2005

No. OFFICE OF THE CLERK

In the  
**Supreme Court of the United States**

NICHOLAS J. DECOULOS,  
as Trustee of Willowdale Realty Trust,  
*Petitioner,*

v.

MARITIMES & NORTHEAST PIPELINE, L.L.C.  
*Respondent.*

**On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the First Circuit**

**PETITION FOR WRIT OF CERTIORARI**

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November 10, 2005

## **QUESTION PRESENTED**

**The Question Presented is:**

**Whether a private natural gas company, that is the holder of a valid Certificate issued by the Federal Energy Regulatory Commission, is obligated to act in good faith, not relating to compensation which was agreed upon by the parties, but in negotiating the language to be contained in the Grant of Easement, all of which negotiations took place prior to the Condemnation Complaint being filed.**

## **STATEMENT PURSUANT TO RULE 29.6**

**Maritime & Northeast Pipeline, L.L.C.** is a coventure with Duke Energy Corporation, a publicly traded company, Emera, Inc. and ExxonMobil Corporation. Ownership interests are as follows:

Duke Energy	77.53%
Emera, Inc.	12.92%
Exxon Mobil Corporation	9.55%

**M & M Management Company**, a subsidiary of Duke Energy, is the operating company.

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## **PETITION FOR A WRIT OF CERTIORARI**

Nicholas J. Decoulos as he is Trustee of the Willowdale Realty Trust respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

### **OPINIONS BELOW**

The opinion and judgment of the United States Court of Appeals for the First Circuit, App. 1a and 8a, are unpublished.

### **STATEMENT OF JURISDICTION**

The United States Court of Appeals entered its opinion and judgment on August 16, 2005. The Court has jurisdiction to review on a writ of certiorari the decision in question pursuant to 28 U.S.C. § 1254(1).

### **RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS**

The Fifth Amendment to the Constitution of the United States provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

without due process of law; nor shall private property be taken for public use, without just compensation.

**15 U.S.C.A. § 717(h) Right of eminent domain for construction of pipelines, etc.**

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds \$3,000.

**STATEMENT OF THE CASE**

This case presents the important question that when the amount of compensation has been agreed upon, is a private natural gas company that has been granted the federal power

of eminent domain obligated to act in good faith in attempting to acquire by contract the easement rights authorized by Federal Energy Regulatory Commission ("FERC"), prior to the condemnation petition being filed.

Respondent, Maritimes & Northeast Pipeline, L.L.C. ("Maritimes"), a natural gas company as defined in the Natural Gas Act ("NGA"), 15 U.S.C. § 717a(6), and the holder of a validly issued Certificate of Public Convenience and Necessity ("CPCN") authorizing the building and operation of a 25-mile, 30-inch gas pipeline from Methuen to Salem, Massachusetts, filed the present action to take temporary and permanent easements on 1.55 acres of land located in Peabody, Massachusetts, owned by the Petitioner, Nicholas J. Decoulos, Trustee of the Willowdale Realty Trust ("Willowdale").

The CPCN issued by FERC limited Maritimes' powers in any eminent domain proceeding as follows:

**FERC'S ORDER RELATING TO THE DELEGATION  
OF THE POWER OF EMINENT DOMAIN**

5. Maritimes' and Algonquin's exercise of eminent domain authority granted under NGA section 7(h) in any condemnation proceedings related to this Order must be consistent with these authorized facilities and locations. Maritimes' and Algonquin's right of eminent domain granted under NGA section 7(h) does not authorize it to increase the size of its natural gas pipeline to accommodate future needs or to acquire a right-of-way for a pipeline to transport a commodity other than natural gas. (App. 12a)

The Order is unambiguous. It limits Maritimes to one 30-inch pipeline, the size of which cannot be increased, and does not authorize Maritimes to acquire a right-of-way for a pipeline to transport a commodity other than natural gas.

For a period of time, Maritimes and Willowdale conducted negotiations as to the location of the easement and as to the language of the covenants to be contained in the Grant of Easement, which would have set forth the benefits and obligations of both parties in the exercise of the easement rights. (App. 29a)

Maritimes' letter dated April 16, 2002, (App. 57a) verifies the amount of compensation was agreed upon and clearly states that the unresolved issue was the disputed legal language of both the easement and the certificate of payment.

On May 20, 2002, Maritimes sent a "final offer" letter to Willowdale and accompanying the letter were two documents, a Grant of Easement and a Certificate of Payment (44a-56a).

The Grant of Easement provided for the installation of a "pipeline or pipelines" and paragraph 9 of Certificate of Payment contained a provision that it could not be recorded at the Registry of Deeds; otherwise, the grantee's covenants would be null and void.

On May 23, 2003, Willowdale responded to Maritimes' last offer by stating that it refused to execute the Grant of Easement and Certificate of Payment because of the covenant barring the recording of the Certificate of Payment. (App. 60a).

Maritimes misrepresented to Willowdale that covenants obligating Maritimes are not recorded at the Registry of Deeds. Appendix 39a, is an example of one of many

recorded grants of easement found in the Registry of Deeds which obligates Maritimes to covenants similar to those requested by Willowdale.

Maritimes claimed in the Condemnation Complaint (App. 14a) that it acted in good faith, which was denied by Willowdale in its Answer (App. 21a).

At the trial, Willowdale attempted to introduce evidence as to the issue of bad faith as it relates to the language to be contained in the Grant of Easement and evidence as to what Maritimes paid to adjoining landowners.

The district court judge ruled, at the time that the offer of proof was made, that bad faith is not an issue in this case. (App. P, 69a).

#### **REASONS FOR GRANTING THE PETITION**

#### **THE DECISION OF THE COURT OF APPEALS FAILED TO RECOGNIZE THE TIME HONORED PRINCIPLE THAT THE TRIAL COURT IS OBLIGATED TO DECIDE FACTUAL AND LEGAL ISSUES IN CONDEMNATION CASES.**

The United States Court of Appeals erred when it decided an important principle of federal law, to wit: whether a party having the power of eminent domain has to act in good faith. The Court stated: "Absent any credible authority making good faith negotiation a requirement precedent to the condemnation action, . . .", (App. 5a). This statement conflicts with the decisions of this Court and other circuit courts.

The Appeals Court failed to follow the ruling in the case of United States v. Reynolds, 397 U.S. 14, 19, 90 S.Ct. 803, 806-807 (1970), which states that Rule 71A(h) of the Fed. Rules Civ. P. "provides that, except for the single issue of just compensation, the trial judge is to decide all issues, legal and factual, that may be presented."

Maritimes had limited powers of eminent domain and in this case exceeded those limited powers, when it attempted in its negotiations to increase the number of pipelines to more than one and when it misrepresented to Willowdale that the covenants were never recorded at the Registry of Deeds. See United States v. Carmack, 329 U.S. 230, 243, 67 S.Ct. 252, 258 (1946).

A distinction exists however, in the case of statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves. These are, in their very nature, grants of limited powers. They do not include sovereign powers greater than those expressed or necessarily implied, especially against others exercising equal or greater public powers. In such cases the absence of an express grant of superiority over conflicting public uses reflects an absence of such superiority.

The issue of bad faith was discussed in the case of United States v. Carmack, supra, at 243, and although no finding of bad faith was made the Court did state: ". . . , it is unnecessary to determine whether or not this selection could have been set aside by the courts as unauthorized by Congress if the designated officials had acted in bad faith or so capriciously and arbitrarily that their action was without adequate determining principle or was unreasoned."

In addition to the decisions of the Supreme Court, the principle of negotiating in good faith has been recognized by several other courts of appeal, to wit:

(1) United States v. 58.16 Acres of Land, More or Less, in Clinton County, State of Illinois, 478 F.2d 1055, 1059 (7<sup>th</sup> Cir. 1973), in which the Court stated:

The Ninth Circuit in Southern Pacific Land Co. v. United States, 367 F.2d 161, 162 (9th Cir. 1966), cert. denied, 386 U. S. 1030, 87 S.Ct. 1478, 18 L.Ed.2d 592 (1967) stated:

But the Supreme Court itself has declined to rule out the possibility of judicial review where the administrative decision to condemn a particular property or property interest is alleged to be arbitrary, capricious, or in bad faith. United States v. Carmack, 329 U.S. 230, 243-244, 67 S.Ct. 252, 91 L.Ed. 209 (1946). And various courts of appeal, including this one, have said that an exception to judicial nonreviewability exists in such circumstances. . . .

In sum, questions of bad faith, arbitrariness, and capriciousness, all bearing upon the determination of public use, having been raised by the Cooleys, the district court was required to resolve those questions.

(2) United States v. Meyer, 113 F.2d 387, 392 (7<sup>th</sup> Cir. 1940):

The decision as to such questions rests wholly in legislative discretion, subject only to the restraints that just compensation must be paid and the determination made in good faith.

(3) Simmonds v. United States, 199 F.2d 305 (9<sup>th</sup> Cir.1952):

. . . ; and in the absence of bad faith or abuse of that discretion his determination is final. *United States v. Meyer*, 7 Cir. 1940, 113 F.2d 387, 392.

(4) United States v. 64.88 Acres of Land, More or Less, Situate in Allegheny County, Pennsylvania, 244 F.2d 534, 536 (3<sup>rd</sup> Cir.1957):

It is well established that, absent bad faith which is not argued here, the government's determination and explicit assertion of the nature and extent of the estate to be taken are not judicially reviewable.

In a companion case involving Maritimes and Willowdale, a different district court judge in exercising the Court's equitable powers, entered an Order for Judgment (App. 35a) which stated:

The real dispute in this case centers on the respective rights of Willowdale and Maritimes as the pipeline easement now runs across a portion of the main access route onto this irregularly shaped parcel. Accordingly, in exercise of its equitable powers, the Court directs the parties to meet, confer, and submit within 30 days a proposed form of easement capable of being recorded in the Essex County Registry of Deeds that is at least favorable as that accorded any other property owner along this Maritimes' pipeline.

The language of that Order is strikingly similar to the "most-favored-nation clause" which is defined in Black's Law Dictionary (8<sup>th</sup> ed. 2004) as follows:

1. A clause in an agreement between two nations providing that each will treat the other as well as it treats any other nation that is given preferential treatment.
2. By extension, such a clause in any contract, esp. an oil-and-gas contract.

That Order sets forth the pinnacle of fairness and consistency, both of which, fairness and consistency, Maritimes lacked in its bad faith negotiations.

### **CONCLUSION**

This Court should grant this petition for a writ of certiorari for the foregoing reasons.

Respectfully submitted:

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## APPENDIX A

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### UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 04-1371

[Filed August 16, 2005]

MARITIMES & NORTHEAST	)
PIPELINE, L.L.C.,	)
Plaintiff, Appellee,	)
	)
v.	)
	)
NICHOLAS J. DECOULOS,	)
as Trustee of Willowdale Realty	)
Trust,	)
Defendant, Appellant,	)
	)
1.55 ACRES OF LAND, MORE	)
OR LESS, IN PEABODY,	)
MASSACHUSETTS; DANVERS	)
SAVINGS BANK; MATTRESS	)
GIANT CORPORATION;	)
CELLCO PARTNERSHIP, d/b/a	)
VERIZON WIRELESS,	)
Defendants.	)
	)

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APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF MASSACHUSETTS

Before: Torruella and Lipez, Circuit Judges, and Barbadoro,<sup>1</sup> District Judge.

**Per Curiam.** This appeal arises out of an action for condemnation of land pursuant to the Natural Gas Act (“NGA”), 15 U.S.C. § 717f(h). The NGA grants private natural gas companies the federal power of eminent domain in the event that they hold a Certificate of Public Convenience and Necessity (“CPCN”) from the Federal Energy Regulatory Commission (“FERC”) and either cannot acquire property by contract, or are unable to agree with the owner of the property on the amount of compensation to be paid for a necessary right of way for the transportation of gas. *Id.*

Appellee Maritimes & Northeast Pipeline, L.L.C. (“Maritimes”), a natural gas company as defined in the NGA, 15 U.S.C. § 717a(6), and the holder of a CPCN authorizing the building and operation of a 25-mile, 30-inch gas pipeline from Methuen to Salem, Massachusetts, filed the present action to take temporary and permanent easements on 1.55 acres of land located in Peabody, Massachusetts. The purpose of the easements is to construct and operate an underground natural gas pipeline along the approved alignment of the CPCN. The temporary easement requires approximately 0.14 acres of the property, while the permanent easement needs 0.25 acres. The land is owned by Willowdale Realty Trust, of which appellant Nicholas J. Decoulos is the trustee. A building on the trust land is leased to the Mattress Giant Corporation and Celico Partnership d/b/a Verizon Wireless.

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<sup>1</sup> Of the District of New Hampshire, sitting by designation.

Maritime attempted to purchase the easement rights over the course of several months of negotiations and discussions, during which time an agent of Maritimes met with or attempted to meet with Decoulos on several occasions. Having failed to reach an agreement, Maritimes dispatched a "final offer letter" on May 20, 2002, in which Maritimes made its final bid based on an appraisal performed by an independent, licensed Massachusetts real estate appraiser. According to this communication, the easement was appraised at \$93,894. Nevertheless, Maritimes made a final offer of \$237,400. Upon rejection of this offer by Decoulos, Maritimes proceeded to file this suit.

Thereafter, Maritimes filed a motion for partial summary judgment and/or immediate entry, seeking an order from the district court to gain easement title to the required property by eminent domain. Notwithstanding Decoulos' opposition, the motion was granted, allowing Maritimes to enter the property to install the pipeline. On April 9, 2003, the district court entered an additional order authorizing Maritimes to take the requested permanent right of way and easement. The matter then proceeded to trial for the purpose of determining the damages to be paid by Maritimes for the takings in question.

The case was tried before a jury, which entered a verdict determining the value of the permanent easement to be the amount of \$68,063. This appeal followed, in which Decoulos raises four issues: (1) whether the district court erred in allowing Maritimes to proceed based on a complaint which allegedly failed to identify "the interest to be taken" as required by Fed. R. Civ. P. 71A(c)(2), (2) whether Maritimes was required to conduct its negotiations with Decoulos in "good faith," (3) whether Maritimes' actions deprive appellant of due process under the Fifth Amendment, and (4) whether the district court erred in refusing to give an

instruction requested by Decoulos regarding an alleged element of damages. We discuss these *seriatim* and find them without legal merit.

Decoulos argues that Fed. R. Civ. P. 71A(c)(2)'s language to the effect that "[t]he complaint shall contain a short and plain statement . . . [of] the interests to be acquired," made defective Maritimes' complaint because it was "devoid of any statement as to the interest to be acquired," and thus appellant "was subjected to the conundrum of speculating the extent of the servitude."

This court has held that Rule 71A(c)(2) "is consistent with the notice theory of pleading embodied in the Federal Rules," *id.*, under which we "do not require a claimant to set out in detail the facts upon which he bases his claim . . . [because of] the liberal opportunity for discovery and the other pretrial procedures . . . to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues," *id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957)). The complaint at issue more than sufficiently notified Decoulos of the substance of the action sought by Maritimes. *See Southern Natural Gas Co. v. ...nd, Cullman County*, 197 F.3d 1368, 1375 (11th Cir. 1999); *East Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808, 830 (4th Cir. 2004).

After deciding the partial summary judgment in favor of Maritimes, and before trial, the district court also decided Maritimes' motion in limine to the effect that Decoulos would not be allowed to introduce any evidence of Maritimes' alleged bad faith negotiations because, as ruled upon by the court, bad faith was irrelevant to the issue of just compensation.

It is unclear to what Decoulos anchors his claim that good faith negotiations must precede the filing of the condemnation action, as the NGA contains no specific language to this effect. *See Lamie v. United States Trustee*, 540 U.S. 526, 534-35 (2004) (inquiry begins with the statutory text, and ends there as well if the text is unambiguous). The relevant section of the NGA provides:

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipeline or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, . . . it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts.

15 U.S.C. § 717f(h).

Once a CPCN is issued by the FERC, and the gas company is unable to acquire the needed land by contract or agreement with the owner, the only issue before the district court in the ensuing eminent domain proceeding is the amount to be paid to the property owner as just compensation for the taking. *See Guardian Pipeline, L.L.C. v. 329.42 Acres of Land*, 210 F. Supp. 2d 971, 974 (N.D. Ill. 2002); *Tennessee Gas Pipeline Co. v. Mass. Bay Transp. Auth.*, 2 F. Supp. 2d 106, 110 (D. Mass. 1998). Absent any credible authority making good faith negotiation a requirement precedent to the condemnation action, *see Kansas Pipeline Co. v. 200 Foot by 250 Foot Piece of Land*, 210 F. Supp. 2d 1253, 1257 (D. Kan. 2002) ("The plain language of the NGA does not impose

an obligation on a holder of a FERC certificate to negotiate in good faith before acquiring land by exercise of eminent domain . . . ."), *cf. National R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 423 (1992) (refusing to interpret statutory language referring to parties being "unable to agree" to require Amtrak to engage in good faith negotiations before it could invoke its condemnation powers under the Rail Passenger Service Act), *but see USG Pipeline Co. v. 174 Acres*, 1 F. Supp. 2d 816, 822 (E.D. Tenn. 1998) (noting that "[c]ourts . . . have imposed a requirement that the holder of the FERC Certificate negotiate in good faith with the owners to acquire the property"), we decline the invitation to create one in this case. Furthermore, we do not imply that the negotiations at issue here were not in good faith.

Appellant's due process argument is intermingled with his "good faith" issue, and results in a similar outcome. Decoulos claims that "Maritime, by acting in bad faith and arbitrarily . . . deprived The Trust of its property rights." The district court rejected an offer of proof by appellant to the effect that there was lack of uniformity in Maritimes' exercise of the power of condemnation as between the various property owners. The district court was undoubtedly correct in ruling that this matter was outside the scope of the only triable issue: the value of the property condemned.

The last question raised by appellant regards a claimed error by the district court in its failure to give a requested instruction dealing with severance and stigma damages. There are several reasons why this contention should not prosper. First, Decoulos failed to properly preserve this claim in accordance with Rule 51(c), Fed. R. Civ. P. 51(c). A party who objects to the court's failure to give a requested instruction must do so on the record before the jury retires to deliberate. *See, e.g., Faigin v. Kelly*, 184 F.3d 67, 87 (1st

Cir. 1999). Second, Decoulos points to nothing in the record that justifies an instruction for severance or stigma damages. See, e.g., *United States v. 760.807 Acres of Land*, 731 F. 2d 1443, 1448 (9th Cir. 1984) ("Severance damages are compensable only if the landowner incurs a direct loss reflected in the marketplace that results from the taking. Since the landowner has the burden of proof in establishing severance damages, the landowner must demonstrate that the taking caused the severance damages.") (internal quotations and citations omitted). Nevertheless, the district court gave an appropriate instruction ("you may add any damages, including stigma damages, as to the remainder of the property, the part that was not taken, but which may have been damaged by the taking and that is called severance damages"), and Decoulos fails to explain why this instruction was inappropriate.

We have considered all other arguments and issues raised by appellant and find them as frivolous and lacking in merit as the rest of this appeal.

**Affirmed.** Appellant is granted 10 days within which to show cause why double costs should not be imposed against him.

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## APPENDIX B

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### UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

No. 02-11108-RWZ

[Filed February 13, 2004]

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MARITIMES & NORTHEAST	)
PIPELINE, L.L.C.,	)
Plaintiff,	)
	)
v.	)
	)
1.55 ACRES OF LAND, MORE	)
OR LESS, IN PEABODY,	)
MASSACHUSETTS, NICHOLAS	)
J. DECOULOS as TRUSTEE OF	)
WILLOWDALE REALTY	)
TRUST,	)
Defendants.	)
	)

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### JUDGMENT

This action came on for trial before the Court and a jury, the Honorable Rya W. Zobel presiding, as to the amount of just compensation that was owed by the plaintiff for the taking of a temporary and permanent easement on 1.55 acres of land in Peabody, Massachusetts owned by Nicholas J. Decoulos as Trustee of the Willowdale Realty Trust.

The parties agreed during the course of the trial that the amount of just compensation owed for the temporary easement was \$28,700 and the jury returned a verdict in the amount of \$68,063 as to the just compensation owed for the taking of the permanent easement.

Therefore, it is Ordered that interest shall accrue on that amount at the annual rate of 4.4% from the date of the taking, which is July 25, 2002, until paid.

/s/ Lisa Urso  
Deputy Clerk

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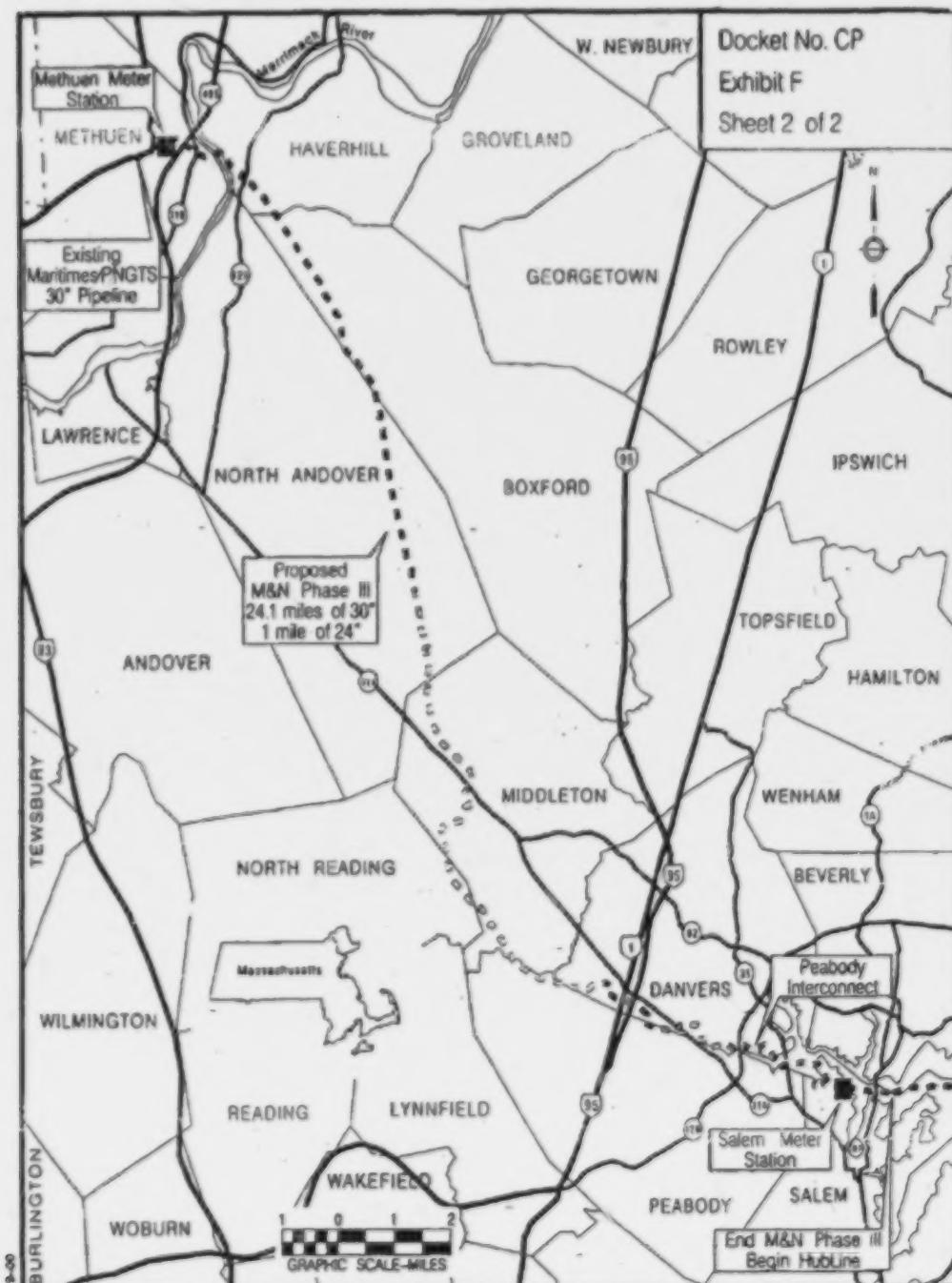
## **APPENDIX C**

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### **MAP OF PROPOSED FACILITIES**

**(Fold out exhibit attached)**

Docket No. CP  
Exhibit F  
Sheet 2 of 2



Proposed facilities associated with the Maritimes & Northeast  
Phase III Project.

LEGEND

- Pipeline—Existing
- Pipeline—Proposed
- Meter Station—Proposed



Maritimes  
& Northeast  
Pipeline

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## APPENDIX D

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### **FERC's Order, limiting the rights of eminent domain, paragraph 5**

- b. the design and implementation of any additional measures deemed necessary (including stop work authority) to assure continued compliance with the intent of the environmental conditions as well as the avoidance or mitigation of adverse environmental impact resulting from project construction and operation.
- 3. Prior to any construction, Maritimes and Algonquin shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, environmental inspectors, and contractor personnel will be informed of the environmental inspector's authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs before becoming involved with construction and restoration activities.
- 4. The authorized facility locations shall be as shown in the FEIS, as supplemented by filed alignment sheets. [\*28] As soon as they are available, and before the start of construction, Maritimes and Algonquin shall file with the Secretary any revised detailed survey alignment maps/sheets at a scale not smaller than 1:6,000 with station positions for all facilities approved by this Order. All requests for modifications of environmental conditions of this Order or site-specific clearances must be written and must reference locations designated on these alignment maps/sheets.

5. Maritimes' and Algonquin's exercise of eminent domain authority granted under NGA section 7(h) in any condemnation proceedings related to this Order must be consistent with these authorized facilities and locations. Maritimes' and Algonquin's right of eminent domain granted under NGA section 7(h) does not authorize it to increase the size of its natural gas pipeline to accommodate future needs or to acquire a right-of-way for a pipeline to transport a commodity other than natural gas.

6. Maritimes and Algonquin shall file with the Secretary detailed alignment maps/sheets and aerial photographs at a scale not smaller than 1:6,000 identifying all route realignments or facility relocations, and staging areas, pipe storage [\*29] yards, new access roads, and other areas that would be used or disturbed and have not been previously identified in filings with the Secretary. Approval for each of these areas must be explicitly requested in writing. For each area, the request must include a description of the existing land use/cover type, and documentation of landowner approval, whether any cultural resources or federally listed threatened or endangered species would be affected, and whether any other environmentally sensitive areas are within or abutting the area. All areas shall be clearly identified on the maps/sheets/aerial photographs. Each area must be approved in writing by the Director of OEP before construction in or near that area.

This requirement does not apply to route variations required herein or minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands.

Examples of alterations requiring approval include all route realignments and facility location changes resulting from:

- a. implementation of cultural resources mitigation measures;
- b. implementation of endangered, threatened, or special concern species mitigation [\*30] measures;
- c. recommendations by state regulatory authorities; and
- d. agreements with individual landowners that affect other landowners or could affect sensitive environmental areas.

7. Within 60 days of the acceptance of this certificate and before construction begins, Maritimes and Algonquin shall file an initial Implementation Plan with the Secretary for review and written

\* \* \*

## **APPENDIX E**

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### **UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS**

**No. 02-11108-WGY**

**MARITIMES & NORTHEAST PIPELINE, L.L.C.  
Plaintiff,**

v.

**1.55 ACRES OF LAND, MORE OR LESS,  
IN PEABODY, MASSACHUSETTS, NICHOLAS J.  
DECOULOS as TRUSTEE OF WILLOWDALE REALTY  
TRUST, DANVERS SAVINGS BANK, MATTRESS  
GIANT CORPORATION, and CELLCO PARTNERSHIP  
d/b/a VERIZON WIRELESS,  
Defendants.**

### **CONDEMNATION COMPLAINT**

**Maritime & Northeast Pipeline, L.L.C.  
("Maritime") alleges as follows.**

### **NATURE OF THE CASE**

1. Maritime is an interstate natural gas pipeline company that has been authorized by the Federal Energy Regulatory Commission ("FERC") to construct an interstate natural gas pipeline and related facilities along a route in northeastern Massachusetts. The pipeline will traverse numerous properties

in seven municipalities, including property in Peabody that is owned by Nicholas J. Decoulos as Trustee of Willowdale Realty Trust. In order to construct the pipeline, Maritimes needs to acquire a temporary and permanent easement on that property. Maritimes, however, has been unable to purchase such easements. Therefore, Maritimes, pursuant to the power of eminent domain vested in it by the Natural Gas Act ("NGA"), 15 U.S.C. § 717f(h), brings this action to condemn such easements and to have this Court ascertain the just compensation that must be paid for such easements.

#### JURISDICTION AND VENUE

2. Jurisdiction and venue are proper in this Court under 15 U.S.C. § 717f(h) because the property that is the subject of this action is located within the eastern district of the District of Massachusetts and the value of the easements to be taken on the property exceeds \$3,000.

#### PARTIES

3. Maritimes is a natural gas company as defined by § 2(6) of the NGA, 15 U.S.C. § 717a(6), and is a limited liability company organized and existing under the laws of the State of Delaware with its principal place of business in Boston, Massachusetts.

4. Nicholas J. Decoulos is the Trustee of Willowdale Realty Trust and as trustee is the record owner of property located on Andover Street, Peabody, Massachusetts that is approximately 1.55 acres, and which is more fully described in a deed recorded in the Essex County (S.D.) Registry of Deeds in Book 15589, Page 69 ("Trust Property").

5. Danvers Savings Bank, which has a place of business at 1 Conant Street, Danvers, Massachusetts, has an interest in the Trust Property under a mortgage which is recorded in the Essex County (S.D.) Registry of Deeds in Book 15589, Page 73.

6. Mattress Giant Corporation, which has a principal place of business at 1200 Trend Drive, Carrollton, Texas, has a leasehold interest in the Trust Property.

7. Celco Partnership d/b/a Verizon Wireless has a leasehold interest in the Trust Property.

### FACTS

8. Before a natural gas company can construct and operate a natural gas transmission pipeline and related facilities, the company must obtain a Certificate of Public Convenience and Necessity from FERC ("Certificate"). On December 21, 2001, FERC issued a Certificate to Maritimes authorizing, among other things, the construction, operation and maintenance of approximately 24 miles of 30-inch pipeline, 1.0 mile of 24-inch pipeline and related facilities that extends from Dracut, Massachusetts to Salem, Massachusetts and will be used to transport natural gas in interstate commerce ("Phase III Pipeline Project"). See 97 FERC ¶ 61,345 (2001). The Certificate requires that the Phase III Pipeline Project be completed and available for service within two years from the date of the Certificate which is December 21, 2003.

9. The Certificate is a companion to a Certificate of Public Convenience and Necessity issued by FERC to another natural gas company, Algonquin Gas Transmission Company,

also on December 21, 2001 for what is known as the HubLine Project. See 97 FERC ¶ 61,345 (2001).

10. The Phase III Pipeline Project will be used to deliver gas to the HubLine Project pipeline which must be in-service by November 1, 2002 or as soon as commercially practicable thereafter.

11. To complete construction of the Phase III Pipeline Project in accordance with the Certificate and along the approved alignment, Maritimes must acquire a permanent and temporary easement on the Trust Property.

12. Construction of the Phase III Pipeline Project is expected to begin in early August 2002 and must be completed as soon as practicable in order to meet the HubLine Project's in-service obligations.

13. Pursuant to 15 U.S.C. § 717f(h), the Certificate confers upon Maritimes the power of eminent domain to condemn land for the purposes of, among other things, constructing, operating and maintaining the Phase III Pipeline Project.

## COUNT ONE

### Condemnation

14. Maritimes repeats and realleges paragraphs 1 through 13 above and incorporates them as if fully set forth herein.

15. Maritimes needs to acquire a temporary and permanent easement on the Trust Property for the purposes

of, among other things, constructing, maintaining and operating the Phase III Pipeline Project.

16. The permanent easement on the Trust Property will occupy approximately 0.25 acres and the temporary easement will occupy approximately 0.14 acres. The boundaries of those easements are depicted on Drawing No. ME-P-9266. A copy of that Drawing is attached as Exhibit A

17. Maritimes has made good faith efforts to purchase the necessary easement rights for the construction and installation of the pipeline on the Trust Property, but has been unable to do so.

18. Pursuant to § 7(h) of the NGA, 15 U.S.C. § 717f(h), Maritimes seeks to take a temporary and permanent easement on the Trust Property by the power of eminent domain.

WHEREFORE, Maritimes requests that the Court:

1. enter an order of taking for the easements on the Trust Property;
2. ascertain and award just compensation for the easements taken on the Trust Property;

and

3. award such other relief as may be necessary or appropriate.

**MARITIMES & NORTHEAST PIPELINE, L.L.C.**

**By its attorneys,**

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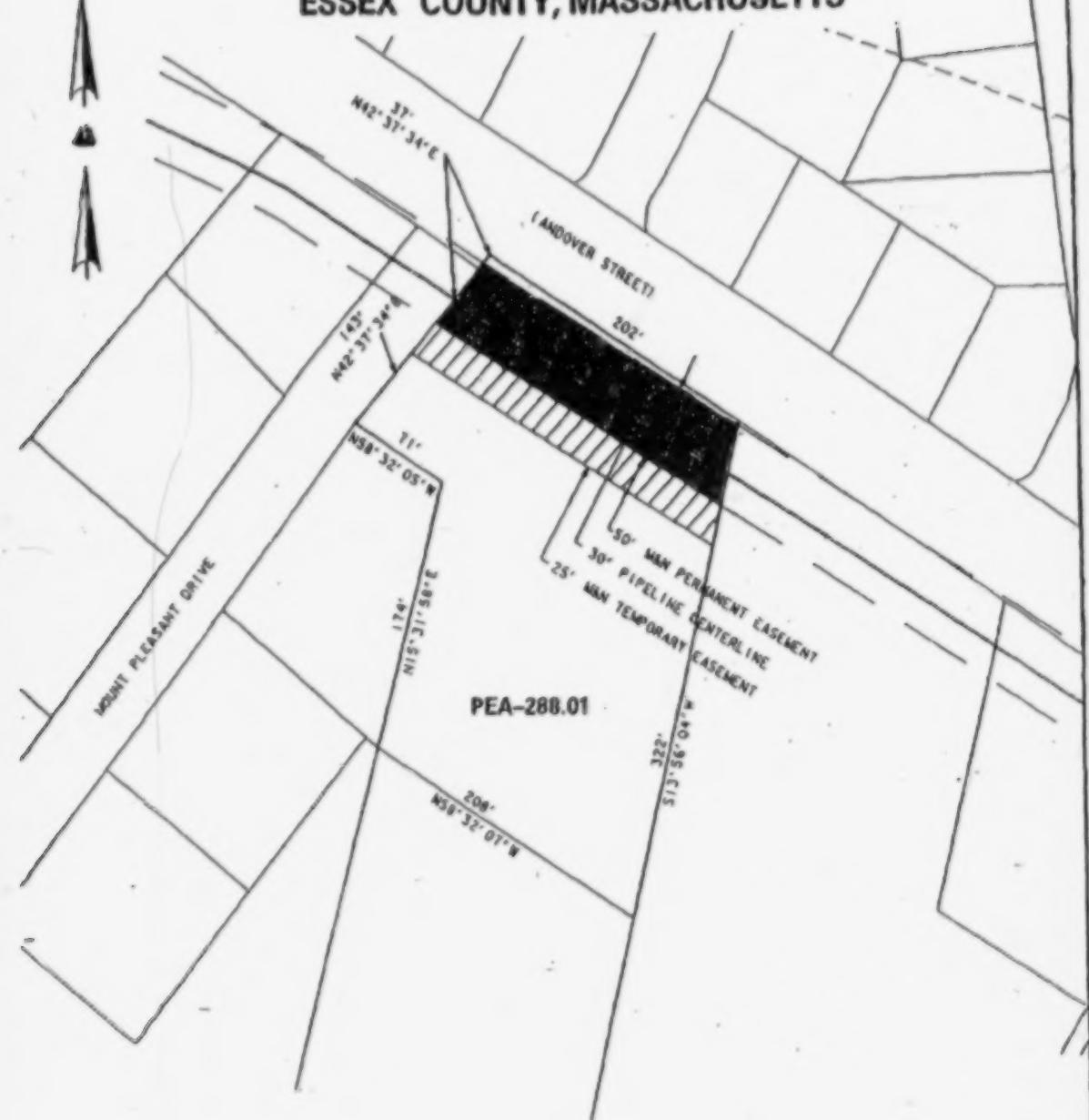
**James T. Finnigan (BBO #549620)**  
**Rich May, a Professional Corporation**  
**176 Federal Street**  
**Boston, Massachusetts 02108**  
**(617) 482-1360**

20a

**FOLD OUT EXHIBIT**

see attached Exhibit A

PEABODY,  
ESSEX COUNTY, MASSACHUSETTS



'A'

- ACTUAL LOCATION OF EASEMENT IS DETERMINED BY THE PIPELINE AS INSTALLED
- DISTANCES AND BEARINGS SHOWN ARE BASED ON COUNTY TAX MAPS AND FIELD SURVEY DATA

INSTANCES AND BEARINGS SHOWN ARE BASED ON COUNTY TAX MAPS AND FIELD SURVEY DATA.

OWNER - N.C.P. WILLOWDALE REALTY TRUST

TRACT  
NO.

PEA-200.01

ALIGNMENT SHEET NO. 88-A-1920

**LOCATION** PEABODY, ESSEX COUNTY, MASSACHUSETTS

**TOTAL DISTANCE** 218.41 FEET **83.30 RODS**

ACROSS PROPERTY 84 AC PERM. 825 AC DRN BY DRS

ROW	W.E. REC.	ROW	W.E. REC.	DIFF. BY	DIS.	DIS.
1	40000000	2	40000000	00000000	00000000	00000000

18

The logo of the National Maritime Museum, which is a black and white illustration of a three-masted sailing ship with its sails partially unfurled, set within a rectangular frame.

# Maritimes & Northeast Pipeline

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## APPENDIX F

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### UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

NO. 02-CV-11108-WGY

MARITIMES & NORTHEAST PIPELINE, L.L.C.,  
Plaintiff

v.

1.55 ACRES OF LAND, MORE OR LESS,  
IN PEABODY, MASSACHUSETTS,  
NICHOLAS J. DECOULOS AS TRUSTEE OF  
WILLOWDALE REALTY TRUST, DANVERS  
SAVINGS BANK, MATTRESS GIANT  
CORPORATION, and CELLCO PARTNERSHIP,  
d/b/a VERIZON WIRELESS,  
Defendants

ANSWER AND JURY CLAIM OF THE  
DEFENDANTS, NICHOLAS J. DECOULOS,  
TRUSTEE OF THE  
WILLOWDALE REALTY TRUST,  
MATTRESS GIANT CORPORATION and  
CELLCO PARTNERSHIP, d/b/a VERIZON  
WIRELESS

1. The Defendants deny all of the allegations contained in paragraph 1 entitled "Nature of the Case", except as to the authority for the taking.

2. Admitted.

3. The Defendants deny that Maritimes is a duly organized corporation and that it has complied with the statutes of the Commonwealth of Massachusetts to conduct business within the Commonwealth of Massachusetts and request that Maritimes affirmatively prove the allegations contained in paragraph 3.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted.

8. The Defendants admit that the Natural Gas Act, 15 U.S.C. § 717f(h) requires a Certificate of Public Convenience and Necessity but deny that the Certificate issued on December 21, 2001 involved the property owned by the Defendant. The Defendants further answer that the Certificate issued on December 21, 2001, refers to that Certificate being limited to the environmental issues. The Defendants neither admit nor deny the remaining allegations contained in paragraph 8 and request that Maritimes prove the same.

9. The Defendants neither admit nor deny the allegations contained in paragraph 9 and request that Maritimes prove the same.

10. Denied.

11. The Defendants deny the allegations contained in paragraph 11, because Maritimes has failed to comply with the Federal Rules of Civil Procedure, Local Rule 71A(c)(2), which requires that (i) a description of the property sufficient for its identification and (ii) the interest to be acquired be set forth in the Complaint.

12. The Defendants neither admit nor deny the allegations contained in paragraph 12 and request that Maritimes prove the same.

13. The Defendants admit that a Certificate issued pursuant to 15 U.S.C. § 717f(h) authorizes the condemnation of property by eminent domain, but deny that it is being properly utilized as it relates to the Defendant's property.

14. The Defendants repeat and reaver their answers in paragraphs 1 through 13 above and incorporate them as if fully set forth herein.

15. The Defendants deny the allegations contained in paragraph 15, because Maritimes has failed to comply with the Federal Rules of Civil Procedure, Local Rule 71A(c)(2), which requires that (i) a description of the property sufficient for its identification and (ii) the interest to be acquired be set forth in the Complaint and as a result thereof, the Defendants are unable to answer the allegations contained in paragraph 15.

16. The Defendants deny the allegations contained in paragraph 16, because Maritimes has failed to comply with the Federal Rules of Civil Procedure, Local Rule 71A(c)(2), which requires that (i) a description of the property sufficient

24a

for its identification and (ii) the interest to be acquired be set forth in the Complaint and as a result thereof, the Defendants are unable to answer the allegations contained in paragraph 16.

17. Denied.

18. Denied.

AFFIRMATIVE DEFENSESFIRST AFFIRMATIVE DEFENSE

The property owned by the Defendant is located in Peabody, Essex County, Massachusetts, and more particularly described in a Deed recorded at the Essex South District Registry of Deeds, Book 15589, Page 69. The Defendant owns the property in fee simple absolute, subject to and with the benefit of the easements set forth in said Deed. The Defendants object to the servitude sought to be appropriated from the Defendants because it does not comply with representations made by Maritimes to FERC in any of its applications to construct the pipeline, representations made by Maritimes, decisions of FERC or certificates issued by FERC.

SECOND AFFIRMATIVE DEFENSE

The Defendants object to the failure of Maritimes to specifically describe the property which is the subject of the proposed taking.

THIRD AFFIRMATIVE DEFENSE

The Defendants object to the failure of Maritimes to specifically describe the interest which Maritimes expects to acquire by the taking.

FOURTH AFFIRMATIVE DEFENSE

Defendants allege that the price offered in compensation for the proposed appropriation is far below a fair valuation of the servitude sought to be appropriated, is unreasonable, unjust, and confiscatory and deprives the Defendants of their

property, in violation of the U.S. Constitution and the Declaration of Rights of the Constitution of the Commonwealth of Massachusetts.

#### FIFTH AFFIRMATIVE DEFENSE

Defendants allege that they should be compensated for the fair valuation of the land sought to be subjected to the servitude, together with an award for the damages caused by the appropriation to the area over which the right of way will exist, as well as to the surrounding land owned by Defendant.

#### SIXTH AFFIRMATIVE DEFENSE

Defendants objects to the servitude sought to be appropriated will unnecessarily and unreasonably burden the remaining land owned by the Defendant, will hamper contemplated future development of such land, will reduce its value, and will restrict the use of the land by Defendant and his successors in title.

#### SEVENTH AFFIRMATIVE DEFENSE

The proposed appropriation of Defendant's land, as described in Maritimes's Complaint, for the purpose of the Pipeline Project is an abuse of discretion for the reason that the amount of land sought to be appropriated is in excess of the land necessary for such purpose, is in the wrong location as it relates to the Defendant's remaining land and is, in fact and law, extravagant and abusive.

WHEREFORE, the Defendants, Decoulos as Trustee, Mattress Giant Corporation and Cellco Partnership, d/b/a Verizon Wireless, request that the Court:

1. issue an Order denying the request for an order of taking because of the failure of Maritimes to properly identify the property and the type of interest to be acquired in the property.
2. enter such other relief as it deems just and meet.

**JURY CLAIM**

THE DEFENDANTS, NICHOLAS J. DECOULOS,  
TRUSTEE OF THE WILLOWDALE REALTY TRUST,  
MATTRESS GIANT CORPOATION and CELLCO  
PARTNERSHIP, d/b/a VERIZON WIRELESS, DEMAND  
A TRIAL BY JURY ON ALL ISSUES.

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Nicholas J. Decoulos  
BBO #117760  
DECOULOS & DECOULOS  
Attorney for Defendants,  
Decoulos as Trustee,  
Mattress Giant Corporation  
and Cellco Partnership,  
d/b/a Verizon Wireless  
248 Andover Street  
Peabody, MA 01960  
Tel. 978/532-1020  
June 17, 2002

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## APPENDIX G

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### UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

**NO. 02-CV-11108-WGY**

**MARITIMES & NORTHEAST PIPELINE, L.L.C.,  
Plaintiff**

v.

**1.55ACRES OF LAND, MORE OR LESS,  
IN PEABODY, MASSACHUSETTS,  
NICHOLAS J. DECOULOS AS TRUSTEE OF  
WILLOWDALE REALTY TRUST, DANVERS  
SAVINGS BANK, MATTRESS GIANT CORPORATION,  
and CELLCO PARTNERSHIP, d/b/a VERIZON  
WIRELESS,  
Defendants**

**AFFIDAVIT OF NICHOLAS J. DECOULOS  
IN SUPPORT OF DENIAL OF MOTION FOR  
SUMMARY JUDGMENT**

I, Nicholas J. Decoulos, do depose and state:

1. I have personal knowledge of the facts set forth herein.
2. I am a lawyer admitted to practice before the United States District Court for the District of Massachusetts.

3. I am counsel of record to the Defendants in this action.
4. I am also the Trustee of the Willowdale Realty Trust.
5. Tabs 1-7 attached hereto are true copies of documents which were generated by me or received by me from the Plaintiff, or were found by me at the Peabody City Hall or the City of Peabody Public Library located in Peabody, Massachusetts.
6. I conducted negotiations with the Plaintiff's representatives as to the location of the easement and as to the language of the covenants to be included in the grant of easement which the Plaintiff is seeking in order to install a 30-inch pipeline for the transmission of natural gas through the Defendant's property.
7. I informed the Plaintiff's representatives that the requested grant of easement exceeded the application made by the Plaintiff to FERC on October 10, 2000 and the orders made by FERC on April 13, 2001 and December 21, 2001.
8. I informed the Plaintiff's representatives that there existed underground utilities located in the area of the proposed easement location.
9. I requested revisions to the Plaintiff's proposed grant of easement, whereby the Plaintiff would covenant that it and its successors in title would be obligated to the Defendants and their successors in title.
10. The Plaintiff's representatives agreed to acknowledge that the pipeline would not disturb any proposed or existing underground utilities and would allow for the use of the area within the right of way for access to the property,

allow the parking of motor vehicles thereon and allow landscaping improvements if so desired by the Defendants.

11. The property owned by the Defendant is zoned for business use.

12. The property owned by the Defendant is currently being used for business purposes.

13. The right of way would be located in an area which is presently being used for ingress and egress to the parking lot which services the buildings located on the property and the area where vehicles are parked to serve the Defendants' business interests.

14. The proposed easement and covenants proposed by me were rejected when the Plaintiff stated that if the grantee's covenants were recorded, then all of the covenants would be null and void (Tab 6, pp. 1-6).

15. I responded to the Plaintiff's final offer by letter dated May 23, 2002 (Tab 6, p. 7).

16. The only response that I received to my letter was the filing of the Complaint.

17. The attached photographs (Tab 5) are a true and accurate depiction of the gas pipeline located on Bay Road in Hamilton, Massachusetts.

Signed under the pains and penalties of perjury.

---

Nicholas. Decoulos  
BBO #117760

**DECOULOS & DECOULOS**  
Attorney for Defendants,  
Decoulos as Trustee,  
Mattress Giant Corporation  
and Cellico Partnership,  
d/b/a Verizon Wireless  
248 Andover Street  
Peabody, MA 01960  
Tel. 978/532-1020  
July 23, 2002

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the above document was served upon the attorney of record for each party, and upon any party appearing pro se, Dated: 7/23/02

/s/ \_\_\_\_\_

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**APPENDIX H**

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**FOLD OUT EXHIBIT**

**Color Photograph**



PHOTOGRAPHS OF GAS PIPELINE INSTALLATION  
LOCATED ON BAY ROAD, HAMILTON, MA  
TAKEN ON JULY 6, 2002

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## APPENDIX I

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### UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

IN re MARITIMES & NORTHEAST PIPELINE, L.L.C.  
CONDEMNATION ACTIONS

97.25 ACRES OF LAND, MORE OR LESS, IN BOXFORD,  
MASSACHUSETTS, OWNED BY JACK R. PEARL;

24.7 ACRES OF LAND, MORE OR LESS, IN BOXFORD,  
MASSACHUSETTS, OWNED BY JOHN P. &  
DOROTHY E. McCORMACK;

39.52 ACRES OF LAND, MORE OR LESS, IN  
METHUEN, MASSACHUSETTS, LEASEHOLD  
INTEREST OF TIMOTHY & CARMELA BENOIT;

4.4 ACRES OF LAND, MORE OR LESS, IN PEABODY,  
MASSACHUSETTS, OWNED BY JAMES MEDEIROS,  
SR. as TRUSTEE OF THE MEDEIROS REALTY  
TRUST;

.714 ACRES OF LAND, MORE OR LESS, IN DANVERS,  
MASSACHUSETTS, OWNED BY JA VENTURA LLC;

59.175 ACRES OF LAND, MORE OR LESS, IN  
DANVERS, MASSACHUSETTS, OWNED BY OSRAM  
SYLVANIA PRODUCTS, INC.;

8.26 ACRES OF LAND, MORE OR LESS, IN PEABODY,  
MASSACHUSETTS, OWNED BY NICHOLAS J.  
DeCOULAS as TRUSTEE OF THE WILLOWDALE  
REALTY TRUST

Consolidated  
CIVIL ACTION  
NO. 02-10941-WGY

CIVIL ACTION  
NO. 02-10980-WGY

CIVIL ACTION  
NO. 02-10982-WGY

CIVIL ACTION  
NO. 02-11047-WGY

CIVIL ACTION  
NO. 02-11050-WGY

CIVIL ACTION  
NO. 02-11054-WGY

CIVIL ACTION  
NO. 02-11066-WGY

CIVIL ACTION  
NO. 02-11107-WGY

ORDER FOR JUDGMENT

YOUNG, C.J. February 27, 2004

These are the last seven of 154 cases brought by Maritimes & Northeast Pipeline, L.L.C. ("Maritimes") to determine judicially what it owes to property owners across whose properties Maritimes has run a natural gas pipeline within a permanent easement it has taken by a power of eminent domain pursuant to the Natural Gas Act, 15 U.S.C. § 717f (h). All seven cases have been fully tried, three with advisory juries, and are presently under advisement.

The formula for ascertaining damages in each of these cases is well known. It requires the Court:

First, to compare the value of the property immediately prior to the taking to the value after the taking of the permanent easement. The difference is the first component of the compensable damages. See *Portland Natural Gas Transmission System v. 19.2 Acres of Land*, 318 F.3d 279, 282 (1<sup>st</sup> Cir. 2003).

Second, the Court must determine the fair rental value of the land temporarily taken so that Maritimes could have access to the permanent easement to construct the pipeline. *Id.*

Third, in cases where Maritimes has damaged the property over which it has run its temporary easements (in these cases primarily by cutting down full growth trees on certain of the temporary easements) the Court must determine the fair value of the damage to the property putatively rented.

The sum of these three damage elements constitutes the aggregate damages owed by Maritimes to the property owner.

Of course, "determining the value of real estate is not a science." *National Railroad Passenger Corp. v. Certain Temporary Easements*, 357 F.3d 36, 38 (1<sup>st</sup> Cir. 2004) *citing Portland Natural Gas Trans. Sys.* at 281.

In the event of further proceedings, the Court reserves the right to enter a full opinion pursuant to Fed. R. Cir. P. 52(a). Within 30 days of the date of this order, the parties shall jointly prepare a judgment in each individual case.

**Property of Jack R. Pearl -- Docket No. 02-10980-WGY**

After full trial, and being properly charged, the advisory jury awarded Mr. Pearl the sum of \$28,000. The Court accepts the recommendation of the advisory jury and orders judgment in the sum of \$28,000.00 plus interest at the statutory rate from the time of the taking.

**Property of John P. and Dorothy E. McCormack -- Docket No. 02-10982-WGY**

After full trial, and being properly charged, the advisory jury awarded the McCormacks \$36,500. While this award is well within the reasonable collective judgment of the jury, upon reflection, emphasizing the remediation costs to replace the trees totally destroyed along the temporary easement, this Court awards \$54,000 and orders judgment to enter in that amount plus interest at the statutory rate from the time of the taking.

**Leasehold Interest of Timothy and Carmela Benoit -- Docket No. 02-11047-WGY**

Timothy and Carmela Benoit had a leasehold interest in this property through which Maritimes constructed the pipeline. They claim damages to their prospective economic benefits from the lease due to Maritimes' taking. The Benoits have failed to prove any damages due to Maritimes' taking.

There is no credible evidence from which the Court could compute the value of the leasehold interest prior to the taking and compare it to the leasehold value after the taking. Moreover, the Court finds that the leasehold had actually been abandoned due to competition from other nurseries. Judgment shall enter for Maritimes.

**Property of James Medeiros Sr. as Trustee of the Medeiros Realty Trust -- Docket No. 02-11050-WGY**

After full consideration of the record after trial, the Court orders judgment in the sum of \$120,000 plus interest at the statutory rate from the time of taking.

**Property of JA Ventura LLC -- Docket No. 02-11054-WGY**

After full consideration of the record after trial, the Court orders judgment in the sum of \$105,550 plus interest at the statutory rate from the time of taking.

**Property of Osram Sylvania Products, Inc. -- Docket No. 02-11066-WGY**

After full trial, and being properly charged, the advisory jury awarded Osram Sylvania Products, Inc. the sum of \$246,000. The Court accepts the recommendation of the advisory jury and orders judgment in the sum of \$246,000 plus interest at the statutory rate from the time of the taking.

**Property of Nicholas J. DeCoulas as Trustee of Willowdale Realty Trust ("Willowdale") -- Docket No. 02-11107-WGY**

After full consideration of the record after trial, the Court orders judgment in the sum of \$10,000 plus interest at the statutory rate from the time of taking.

The real dispute in this case centers on the respective rights of Willowdale and Maritimes as the pipeline easement

now runs across a portion of the main access route onto this irregularly shaped parcel. Accordingly, in exercise of its equitable powers, the Court directs the parties to meet, confer, and submit within 30 days a proposed form of easement capable of being recorded in the Essex County Registry of Deeds that is at least as favorable as that accorded any other property owner along this Maritimes' pipeline.

SO ORDERED.

/s/

**WILLIAM G. Young**  
**CHIEF JUDGE**

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## APPENDIX J

---

### Grant of Easement

Tract No. DAN-270  
DAN-271

COMMONWEALTH OF MASSACHUSETTS

COUNTY OF ESSEX

KNOW ALL MEN BY THESE PRESENTS: that the undersigned Costco Wholesale Corporation, a Washington corporation, having a mailing address of P.O. Box 97077, Kirkland, Washington 98083 (hereinafter called "Grantor", whether one or more) for and in consideration of the sum of Ten Dollars (\$10.00) and other valuable consideration paid by MARITIMES & NORTHEAST PIPELINE, L.L.C., a Delaware limited liability company, having its principal place of business at 1284 Soldiers Field Road, Boston, MA 02135, (hereinafter called "Grantee") the receipt and sufficiency of which is hereby acknowledged, does hereby give, grant and convey with QUITCLAIM COVENANTS unto Grantee, its successors and assigns, subject to the limitations and reservations herein stated, a permanent right-of-way and easement for the purpose of laying, constructing, maintaining, operating, altering, replacing, repairing, abandoning and removing a pipeline or pipelines (the "Pipeline") with below grade valves, tieovers, meters, regulators, data acquisition, communication lines and devices, cathodic protection devices and other appurtenant facilities ("Appurtenant Facilities"), all of which shall be and remain the property of Grantee, for the

transmission of natural gas and all by-products thereof or any liquids, gases, or non-radioactive energy substances which can be transported through a pipeline; under the following described land of Grantor situated in the Town of Danvers, County of Essex, more particularly described as the land described in a deed from Arturo J. Gutierrez and John A. Cataldo, Trustees of Danvers Office Park Realty Trust recorded with the Essex County S.D. Registry of Deeds in Book 10563, Page 598 ("the Land").

The bounds of the permanent right-of-way and easement granted herein (the "Right-of-Way") are more particularly shown on the drawing as "N/F Costco Wholesale Corporation", Drawing No. ME-P-9248, dated 10-24-01 and prepared by M.J. Harden Associates, Inc., attached hereto as Exhibit A and incorporated by reference, as Tract DAN-270 and DAN-271. Notwithstanding anything to the contrary as shown on the drawing, the permanent and temporary easement rights granted to Grantee herein shall extend to and include public or private ways, or streams and rivers to the full extent of the Grantor's interest therein.

Also included in the herein Grant of Easement is the use of a temporary work space identified as "M&N Temporary Easement" on the attached drawings and use of a temporary access road easement for foot and vehicle identified as TAR-18.90 on Drawing No. TAR-18.90 attached hereto as Exhibit B. Said temporary work space and temporary access road easement, which shall be used for the construction of the pipeline and restoration of the permanent and temporary rights-of-way, will expire twelve (12) months after the date of execution of this instrument.

This Grant of Easement also includes Grantor's perpetual consent to Grantee's use of permanent easement area on

Tracts DAN-269 shown on Drawing No. ME-P-9245 attached hereto as Exhibit C and DAN-268 shown on Drawing No. ME-P-9246 attached hereto as Exhibit D.

The Grantee shall have all other rights and benefits necessary or convenient for the full enjoyment of use of the rights herein granted, including but not limited to, the right to remove, clear, and to keep clear, all buildings, walls, or similar structures, above or below ground swimming pools, decks, rocks, trees, brush, limbs, and other obstructions including, but not limited to, underground pipelines and conduits, which might interfere with the use of the Right-of-Way, and the free and full right of ingress and egress, over and across said Right-of-Way and easement. Grantee acknowledges that Grantor shall be permitted to use the Right of Way as a parking area after completion of construction subject to Grantee's right to perform maintenance inspections, repair work and other work associated with maintaining a gas pipeline in the Right of Way.

All pipelines shall be buried to a depth required by applicable laws and regulations.

Grantor shall not grade, excavate, fill or flood the Right-of-Way without obtaining the Grantee's prior written consent which shall not be unreasonably withheld or delayed.

The rights, title and privileges herein granted may, in whole or in part, be sold, leased, assigned, pledged, and mortgaged, and shall be binding upon and inure to the benefit of the parties hereto, their respective heirs, executors, administrators, successors, assigns and legal representatives.

Subject to the above grants, Grantor reserves the right to occupy and use the surface of the permanent easement areas

for parking, pedestrian and vehicular use, and otherwise, as described in Certificate of Payment and Agreement, dated July 26, 2002, a copy of which is to be held by Grantor, Grantee, their successors and assigns ("COP"). The terms of the COP neither condition the easements granted to Grantee under this instrument nor create the possibility of a reverter or reversion of all or any portion of the rights granted to Grantee hereunder. Reference is made to the COP for notice purposes only. Nothing herein shall limit Costco's rights or Maritimes obligations under that COP.

The failure of Grantee or Grantor to exercise any rights herein conveyed or retained in any single instance shall not be considered a waiver of such right or rights and shall not bar Grantee or Grantor from exercising such right or rights, or if necessary, seeking an appropriate remedy in conjunction with such right or rights.

The undersigned, hereby declares that he/she is an incumbent, authorized Vice President of Costco Wholesale Corporation as of the effective date of this instrument and is empowered and properly authorized to convey the property rights described herein.

**IN WITNESS WHEREOF** Grantor has hereunto set the hands of its authorized officer this 26<sup>th</sup> day of July 2002.

**COSTCO WHOLESALE CORPORATION**

Witness /s/ \_\_\_\_\_

/s/ \_\_\_\_\_

Richard J. Olin  
Vice President

STATE OF WASHINGTON

County of King. SS.

July 26, 2002

Then personally appeared the above named Richard J.  
Olin Vice President, of Costco Wholesale Corporation and  
acknowledge, Cd the foregoing instrument to be the free act  
and deed of said corporation, before me:

/s/

Notary Public (PRINT) Susan L. Kansky  
My Commission Expires: 9/15/03

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## APPENDIX K

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### **MARITIMES & NORTHEAST PIPELINE**

5 Batchelder Road, Suite 200  
Seabrook, NH 03874  
(603) 474-8188  
Toll Free: (888) 367-7005  
Facsimile: (603) 474-8186

May 20, 2002

Nicholas J. DeCoulos, Trustee  
Willowdale Realty Trust  
248 Andover Street  
Peabody, MA 01960

**Re: Final Offer Letter/Maritimes & Northeast  
Pipeline, L.L.C. Tract(s) PEA-288.01, PEA-  
291.01**

Dear Sir or Madam:

As you are aware, Maritimes & Northeast Pipeline, L.L.C. ("Maritimes"), an interstate natural gas pipeline company, was issued a Certificate of Public Convenience and Necessity by the Federal Energy Regulatory Commission ("FERC") on December 21, 2001 in Docket Nos. CP96-809-000 and CP96-810-000. This authorization allows Maritimes to construct, operate and maintain an interstate natural gas pipeline across your property in the City of Peabody, Massachusetts.

Since October 24, 2000, you have been apprised of this project through written communication, public informational meetings, FERC scoping meetings, other related hearings and personal contacts. On December 12, 2001, you were forwarded a Landowners Information Brochure, which provided specific information related to the project activities including the easement acquisition process. Maritimes began negotiations with you for the purchase of the necessary easement interest on December 14, 2001. During these negotiations, Maritimes representatives also informed you of the need to acquire an easement from you at this time because Maritimes must begin construction activities by August 1, 2002.

The necessary interest in land we have been attempting to acquire from you is described in the easement document that was previously provided to you and is also enclosed herewith. Also enclosed is Drawing No(s). ME-P-9266, ME-P-9268.1 which show(s) the proposed 50 foot wide permanent easement, totaling approximately 0.27 acres, with an additional temporary work space comprising approximately 0.41 acres and traversing your property for a distance of approximately 219.41 feet, as well as Access Road TAR-20.72. This easement interest across your property has been appraised based upon fair market value at \$93,894.00 (the "Appraised Value").

To date we have been unable to reach an agreement regarding the compensation to be paid for the necessary easement interest. Accordingly, I hereby extend to you \$237,400.00 as the final offer for the easement interest to be acquired by Maritimes. This offer is made solely for the purpose of settling our disagreement concerning the value of the interest sought and does not in any way reflect the belief

or opinion of Maritimes that the value of the interest exceeds the Appraised Value.

This final offer expires at the close of business on Tuesday, May 28<sup>th</sup>, 2002. Should you accept this final offer, please contact your Maritimes representative, Shep Wilbar, at our toll free telephone number (888) 367-7005.

If you do not accept this offer, or fail to respond by the expiration date mentioned above, Maritimes will be compelled to initiate eminent domain proceedings in the U.S. District Court for the District of Massachusetts in accordance with the Federal Natural Gas Act. Please be advised that in such an event, Maritimes may take the position that the appropriate compensation for the easement interest to be acquired is less than the Appraised Value.

In the event Maritimes must initiate the eminent domain proceedings, we remain willing to work with you throughout that process to reach an amicable settlement.

Very truly yours,

/s/

F.S. Gessner  
Manager, Right-of-Way

Enc.   Grant of Easement  
          Certificate of Payment  
          Plat

**GRANT OF EASEMENT**

**COMMONWEALTH OF MASSACHUSETTS**

**COUNTY OF ESSEX**

**Tract No. PEA-288.01  
PEA-291.01**

KNOW ALL MEN BY THESE PRESENTS: that the undersigned Nicholas J. Decoulos as he is the Trustee of the Willowdale Realty Trust u/d/t recorded in the Essex County South District Registry of Deeds at Book 4827, Page 99 as amended at Book 6099, Page 100 and Book 9812, Page 493 of said Registry of Deeds (the "Trust") (hereinafter called "Grantor", whether one or more), of 248 Andover Street, Peabody, Massachusetts, for and in consideration of the sum of Ten Dollars (\$10.00) paid by MARITIMES & NORTHEAST PIPELINE, L.L.C., a Delaware limited liability company, having its principal place of business at 1284 Soldiers Field Road, Boston, MA 02135, (hereinafter called "Grantee") the receipt and sufficiency of which is hereby acknowledged, does hereby give, grant and convey with QUITCLAIM COVENANTS unto Grantee, its successors and assigns, subject to the limitations and reservations herein stated, a permanent right-of-way and easement for the purpose of laying, constructing, maintaining, operating, altering, replacing, repairing, abandoning and removing a pipeline or pipelines, all of which shall be and remain the property of Grantee, for the transmission of natural gas which can be transported through a pipeline; under the following described land of Grantor situated in the City of Peabody, County of Essex, more particularly described as the land described in a deed from Kancov Investment Limited Partnership to Grantor recorded with the Essex County South

District Registry of Deeds in Book 15589, Page 69 and a foreclosure and deed from F&M Distributors, Inc. to Grantor recorded in said Registry of Deeds at Book 13787, Page 524; see also deed recorded at Book 4829, Page 17 of said Registry of Deeds (the "Land").

The bounds of the permanent right-of-way and easement granted herein (the "Right-of-Way") are more particularly shown on two drawings entitled "N/F Willowdale Realty Trust", Drawing No. ME-P-9266, and Drawing No. ME-P-9268.1 each dated 10-24-01 prepared by M.J. Harden Associates, Inc., attached hereto and incorporated by reference, as Tract PEA-288.01 and Tract PEA-291.01 on the Land is affected hereby. Notwithstanding anythin to the contrary as shown on the drawing, the permanent and temporary easement rights granted to Grantee herein shall extend to and include public or private ways, or streams and rivers to the full extent of the Grantor's interest therein.

Also included in the herein Grant of Easement is the use of a temporary work space as shown on the attached drawing as "M&N Temporary Easement" and temporary access road easement shown as TAR-20.72 on Drawing No. 20.72 attached hereto. Said temporary work space and temporary access road, which shall be used for the construction of the pipeline and restoration of the permanent and temporary rights-of-way, will expire twenty four (24) months after the date of execution of this instrument.

The Grantee shall have all other rights and benefits necessary or convenient for the full enjoyment of use of the rights herein granted, including but not limited to, the right to remove, clear, and to keep clear, all buildings, walls, or similar structures, below ground swimming pools, decks, rocks, trees, brush, limbs, and other obstructions including,

but not limited to, underground pipelines and conduits, except for the electrical conduit which presently exists in the Right-of-Way, and the free and full right of ingress and egress only during emergencies, over and across said Right-of-Way and easement.

All pipelines shall be buried to a depth required by applicable laws and regulations.

Grantor shall not grade, excavate, fill or flood the Right-of-Way without obtaining the Grantee's prior written consent.

The rights, title and privileges herein granted may, in whole or in part, be sold, leased, assigned, pledged, and mortgaged, and shall be binding upon and inure to the benefit of the parties hereto, their respective heirs, executors, administrators, successors, assigns and legal representatives.

The failure of Grantee to exercise any rights herein conveyed in any single instance shall not be considered a waiver of such right or rights and shall not bar Grantee from exercising such right or rights, or if necessary, seeking an appropriate remedy in conjunction with such right or rights.

Grantor understands and agrees that the person securing this grant is without authority from Grantee to make any agreement in respect to the subject matter hereof not herein expressed.

IN WITNESS WHEREOF Grantor has hereunto set his hand this    day of   , 2002.

**WILLOWDALE REALTY TRUST**

Witness \_\_\_\_\_

By: Nicholas J. Decoulos, Trustee and  
Not Individually  
Hereunto Duly Authorized

\_\_\_\_\_  
**Helen F. Decoulos**  
**Sole Beneficiary**

**COMMONWEALTH OF MASSACHUSETTS**

County of Essex, ss.

\_\_\_\_\_, 2002

Then personally appeared the above named Nicholas J. Decoulos, Trustee of the Trust and Helen F. Decoulos, the sole Beneficiary, acknowledged the foregoing instrument to be their free act and deed, and the free act of the Trust, before me.

\_\_\_\_\_  
**Notary Public (PRINT)**  
**My Commission Expires:**

**CONSENT OF LESSEE**

Celco Partnership d/b/a Verizon f/k/a Bell Atlantic Mobile being lessee under a lease of a portion of the above referenced Land dated the 31st day of March, 1999, hereby agrees and consents to the above Grant of Easement.

**Celco Partnership d/b/a**  
**Verizon f/k/a Bell Atlantic Mobile**

By: \_\_\_\_\_  
General Partner

**CONSENT OF LESSEE.**

Mattress Giant Corporation a \_\_\_\_\_ corporation being lessee under a lease of a portion of the above referenced Land dated the 15st day of March, 1999, hereby agrees and consents to the above Grant of Easement.

**Mattress Giant Corporation**

By: \_\_\_\_\_  
President

By: \_\_\_\_\_  
Treasurer

**STATE OF** \_\_\_\_\_

**County of** \_\_\_\_\_, ss. \_\_\_\_\_, 2002

Then personally appeared the above named \_\_\_\_\_ of Cellco Partnership and acknowledged the foregoing instrument to be the free act and deed of said partnership, before me.

\_\_\_\_\_  
Notary Public (PRINT).  
My Commission Expires:

**STATE OF** \_\_\_\_\_

**County of** \_\_\_\_\_, ss. \_\_\_\_\_, 2002

Then personally appeared the above named \_\_\_\_\_ [President], \_\_\_\_\_ [Treasurer], of Mattress Giant Corporation and acknowledged the foregoing instrument to be the free act and deed of said corporation, before me.

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Notary Public (PRINT).  
My Commission Expires:

**CERTIFICATE OF PAYMENT**

**Tract No. PEA-288.01  
PEA-291.01**

RECEIVED of MARITIMES & NORTHEAST PIPELINE, L.L.C., a Delaware limited liability company ("Maritime"), \_\_\_\_\_ Dollars, (\$\_\_\_\_\_) which is in full payment, settlement and satisfaction for and in consideration of a Grant of Easement from the undersigned to Madames, dated the \_\_\_\_\_ day of \_\_\_\_\_, 2002, (the "Grant of Easement") and further \_\_\_\_\_ Dollars, (\$\_\_\_\_\_) for all detriment, injuries and damages of whatsoever nature and character to land fixtures and improvements as listed below, growing out of, incident to or in connection with the construction by Maritimes of a certain pipeline to be laid on, over or through certain lands described in the Grant of Easement, and the undersigned does hereby release and discharge Maritimes, its agents and contractors, from all liabilities therefor of whatsoever nature or character in connection with construction of said pipeline within the temporary and permanent easement boundaries that are described in the Grant of Easement except as follows:

**GRANTEE'S COVENANTS**

In consideration of this release the Grantee covenants for is successor in title and assigns the following which covenants do not condition the rights granted to Maritimes under the Grant of Easement.

1. After initial pipeline construction whenever the Grantee enters upon the Right-of-Way to use its rights granted herein, it shall exercise those rights in an expeditious manner and not unreasonably interfere with the use of the premises by

the Grantor, its assigns, lessees and tenants. In the event that the Grantee does unreasonably interfere with the Grantor's business or the Tenant's business, if any, the Grantee agrees to pay the Grantor, or his lessees and tenants, any actual damages which may arise from the construction, maintaining, operating and removing of the pipeline.

2. The Grantor acknowledges on behalf of himself, his tenants and invitees, that he and they have received full compensation and damages for all business interruptions that the Grantee and its contractors may cause on the premises during the period of the initial pipeline construction.

3. All pipelines shall be buried to a depth required by applicable laws and regulations.

4. The Grantee shall not unreasonably interfere with the existing conduit located in the Right-of-Way which provides electrical service to the building located at 262 Andover Street, Peabody, Massachusetts.

5. As soon as practicable, but no later than thirty (30) days, following the installation of the pipeline and at any other time when the Grantee disturbs the surface of the Right-of-Way, the Grantee will cause to be removed from the Right-of-Way all debris, surface material and construction equipment and restore the surface of the Right-of-Way to a condition the same as that existing before the construction operations were commenced, at no cost to the Grantor.

6. The Grantee covenants that it shall repair and maintain and keep repaired the Right-of-Way in a proper, substantial and workmanlike manner, in the same condition as it was found prior to the repair or maintenance activity on the Right-of-Way.

7. At all other times, the Grantee shall give reasonable notice when it intends to enter upon the Right-of-Way and easement.

8. The Grantor and the Grantee covenant with each other that prior to the installation of the pipeline, both the Grantor and the Grantee shall agree as to the location of any existing underground conduits or facilities of any kind in order to avoid the disruption of the use of those conduits. Within ten days of the execution of this agreement, the Grantor shall furnish to the Grantee a sketch depicting the location of those underground conduits.

9. In the event that Grantor or Grantor's successors or assigns record this Certificate of Payment or any affidavit or other instrument that refers to it in whole or part in any Registry of Deeds or Land Registration Office or other public office where deeds or other instruments pertaining to rights in property may be recorded, then Grantee's Covenants as set forth in paragraph 1 through 9 above shall be null and void and unenforceable effective as of the date of such recordings.

**WILLOWDALE REALTY TRUST**

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2002.

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Printed Name: Nicholas J. Decoulos, as  
Trustee and Individually

**MATTRESS GIANT CORPORATION, Lessee**

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2002.

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Printed Name: \_\_\_\_\_, President

DATED this    day of       , 2002.

Printed Name: \_\_\_\_\_  
Treasurer

CELLCO PARTNERSHIP d/b/a VERIZON  
f/k/a BELL ATLANTIC MOBILE, Lessee

DATED this    day of       , 2002.

Printed Name: \_\_\_\_\_  
General Partner

Printed Name:  
Agent for Maritimes & Northeast Pipeline,  
L.L.C.

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## APPENDIX L

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**MARITIMES & NORTHEAST PIPELINE**  
5 Batchelder Road, Suite 200  
Seabrook, NH 03874  
(603) 474-8188  
Toll Free: (888) 367-7005  
Facsimile: (603) 474-8186

April 16, 2002

Nicholas J. DeCoulos, Trustee  
Willowdale Realty Trust  
248 Andover Street  
Peabody, MA 01960

Re: Maritimes & Northeast Pipeline Tracts: PEA-  
288.01 & PEA-291.01  
Willowdale Realty Trust

Dear Nick:

We initially met on January 2, 2002 to discuss the details of the natural gas pipeline scheduled to be installed by Maritimes in the summer of 2002.

At this meeting we discussed an estimated easement value of \$160,524.00, broken down as follows:

PEA-288.01 -	Verizon building	\$144,452.00
PEA-291.01 -	Rte. 114 Access to rear property beside KFC	<u>\$ 16,027.00</u>
<b>TOTAL</b>		<b>\$160,524.00</b>

Additionally, you requested that we relocate the 100' x 100' parking area originally planned for the rear of The Home Buffet parking lot further back onto your property. I mentioned that we could pay approximately \$32,000.00 for the temporary use of the area, and that it would have to be approved by our engineering dept. You also wanted to thoroughly review the proposed easement form.

We have met and conversed by telephone on many occasions since then and have agreed upon the following:

- 1) The shift of the 100' x 100' parking area to your property has been approved by the engineering for location and environmental impact. See attached plan.
- 2) The price for the easements have been agreed upon at \$37,400.00

PEA-288.01 - Verizon Building  
(Permanent & Temporary workspace) \$183,600.00

PEA-291.01 - Rte. 114 Access  
(Permanent & Temporary workspace) \$21,600.00

Parking Area  
(100' x 100' temporary space) \$32,200.00

<b>TOTAL</b>	<b>\$237,400.00</b>
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- 3) The remaining unresolved issues are the disputed legal language of the easement and certificate of payment and the consent of Garrick Steele for using the access road between the KFC and Home Buffett Restaurants. As you are aware Mr. Stele is not responding to my calls. With mutual cooperation we can hopefully work these differences out.

Thank you for your cooperation.

Sincerely yours,

*/s/* \_\_\_\_\_

Shepard C. Wilbar  
Senior Right-of-Way Agent

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## APPENDIX M

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**WILLOWDALE REALTY TRUST**  
248 Andover Street  
Peabody, MA 01960  
Tel. (978) 532-1020

May 23, 2002

F.S. Gessner, Manager, Right-of-Way  
Maritimes & Northeast Pipeline  
5 Batchelder Road, Suite 200  
Seabrook, NH 03874

**Re: Tract(s) PEA-288.01, PEA-291.01**  
**Willowdale Realty Trust**

Dear Mr. Gessner:

I acknowledge receipt of your letter dated May 20, 2002. I am sorry that I cannot accept your final offer for the reasons stated by me when you visited my office and as I told you on the telephone. The covenants made by the grantee must be recorded at the Essex South District Registry of Deeds.

The reason for my insistence is very basic. The covenants of the grantee, unless recorded at the Registry of Deeds, do not bind a subsequent purchaser of the easements being granted to Maritimes by the Trust. In view of that fact, it would foolhardy and, if I was representing a client instead of myself as Trustee, I would be exposed to a malpractice suit.

61a

Accordingly, unless you agree that the grantee's covenants be included in the Grant of Easement or in a separate document which can be recorded at the Registry of Deeds, I am unable to accept your offer and execute the documents to effectuate the grant of the easement.

Very truly yours,

**WILLOWDALE REALTY TRUST**

Nicholas J. Decoulos, Trustee

NJD:aw

## APPENDIX N

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### UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

No. 02-11108-RWZ

MARITIMES & NORTHEAST PIPELINE, L.L.C.

Plaintiff,

v.

1.55 ACRES OF LAND, MORE OR LESS,  
IN PEABODY, MASSACHUSETTS, NICHOLAS J.  
DECOULOS as TRUSTEE OF WILLOWDALE REALTY  
TRUST, DANVERS SAVINGS BANK, MATTRESS  
GIANT CORPORATION, and CELLCO PARTNERSHIP  
d/b/a VERIZON WIRELESS,

Defendants.

### ORDER OF TAKING

IT IS HEREBY ORDERED THAT:

Maritimes & Northeast Pipeline, L.L.C. ("Maritimes") is authorized to take a permanent right-of-way and easement and a temporary easement on the property described below that is the subject of this action for the purposes of laying, constructing, maintaining, operating, altering, replacing,

repairing, abandoning and removing an underground pipeline with below grade valves, tie-overs, meters, regulators, data acquisition, communication lines and devices, cathodic protection equipment and other appurtenant facilities and above grade pipeline markers and cathodic protection test stations for the transmission of natural gas.

Maritives shall have all other rights and benefits necessary or convenient for the full enjoyment of the right-of-way and easement rights taken, including, but not limited to, the right to remove, clear and to keep clear, all buildings, walls or similar structures, above or below ground swimming pools, decks, rocks, trees, brush, limbs and other obstructions, including, but not limited to, underground pipelines and conduits, that might interfere with the use of the right-of-way and easements and the free and full right of ingress and egress over and across the right-of-way and easements.

The property on which the easements are located is owned by Nicholas J. Decoulos as the Trustee of Willowdale Realty Trust, is approximately 1.55 acres, is located on Andover Street in Peabody, Massachusetts, and is more fully described in a deed recorded in the Essex County (S.D.) Registry of Deeds in Book 15589, Page 69 ("Trust Property").

The permanent easement on the Trust Property will occupy approximately 0.25 acres and the temporary easement will occupy approximately 0.14 acres. The boundaries of those easements are depicted on Drawing No. ME-P-9266. A copy of that Drawing is attached as Exhibit A

The temporary easement on the Trust Property shall expire twelve (12) months after completion of the installation

64a

of the pipeline or two (2) years from July 25, 2003 whichever is later.

/s/  
United States District Judge

Dated: April 9, 2003

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## APPENDIX O

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### UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

NO. 02-CV-11108-RWZ

MARITIMES & NORTHEAST PIPELINE, L L.C.,  
Plaintiff

v.

1.55 ACRES OF LAND, MORE OR LESS,  
IN PEABODY, MASSACHUSETTS, et al.  
Defendants

**DEFENDANT'S AFFIDAVIT TO SUPPORT DENIAL  
OF PLAINTIFF'S MOTION IN LIMINE TO  
EXCLUDE EVIDENCE  
REGARDING ALLEGED BAD FAITH**

I, Nicholas J. Decoulos, do hereby state that the following statements are based upon my own knowledge, information, or belief and that the facts and matters set forth herein are true and correct, and so far as based upon information and belief, I do believe the information to be true:

1. I am a lawyer admitted to practice before the United States District Court for the District of Massachusetts.
2. I am the Trustee of the Willowdale Realty Trust.

3. As an attorney, I represented three property owners upon whose property Maritimes has filed a complaint for condemnation.

4. The Willowdale Realty Trust is a named defendant in two cases involving property in which Maritimes has installed a 30-inch pipeline.

5. Prior to the filing of the complaint by Maritimes, I conducted negotiations, on behalf of my three clients and the Willowdale Realty Trust, for the purpose of resolving the grant of easement requested by Maritimes.

6. I met personally at various times with three representatives of Maritimes, namely, Shepard Wilbar, Terrace Traudt and Franklin Gessner.

7. My initial contact with Maritimes was by mail, when I received a letter from Franklin S. Gessner, in which he enclosed a brochure entitled "Landowners Information Brochure".

8. The first time that I met with Wilbar was in January, 2002, when he delivered to me a grant of easement in recordable form and a certificate of payment not in recordable form, which contained covenants affecting the properties of my clients and Willowdale.

9. In my conversations with Wilbar, I informed him that I would not sign nor advise the grant of easement that was presented to me and gave as reason that Maritimes was attempting to obtain the following rights in the properties, none of which rights were granted to Maritimes by the Federal Energy Regulatory Commission (FERC) :

"... easement for the purpose of laying, constructing, maintaining, operating, altering, replacing, repairing, abandoning and removing a pipeline or *pipelines* with above or below grade valves, tie-overs, meters, regulators' data acquisition, communication lines and devices, cathodic protection devices and other appurtenant facilities, all of which shall be and remain the property of Grantee, for the transmission of natural gas and by-products thereof or any liquids, gases, or substances which can be transported through a pipeline; over, under, across, and upon the following described land ...." (Emphasis supplied).

10. I informed Wilbar that that was not what was represented to the landowners by FERC and that I would not grant that type of an easement to Maritimes. I also called to his attention that the approval by FERC stated only one 30-inch pipeline and that it was to be only an underground installation. He then referred me to an attorney whose name is Paul Bhenke and my negotiations with him were unsuccessful. I was informed by Mr. Bhenke that the forms presented were basically unalterable.

11. I attempted on several occasions, in particular, a conference that I had with Gessner, Traudt and Wilbar at my office to convince them that the covenants which were contained in the Certificate of Payment should be in recordable form. I was informed by Gessner that under no circumstances would the Certificate of payment be adjusted to allow it to be recorded.

12. The final offer by Maritimes was made in a letter dated May 20, 2002, which was accompanied by a grant of easement which, once again, allowed for the installation of a "pipeline or pipelines" and the certificate of payment was

devoid of any of the covenants previously submitted by Wilbar and was, once again, in a non-recordable format.

12. Attached to this Affidavit is an annotation of the easement documents that were exchanged between Maritimes and landowners in Essex County and were recorded at the Northern and Southern Districts of the Registry of Deeds, which documents reveal that covenants that were being sought by Decoulos and his clients and were refused by Maritimes were being granted and accepted by Maritimes with other landowners. Copies of the actual documents can be furnished instantaneously.

Signed under the penalties of perjury this 26th day of August, 2003.

---

Nicholas J. Decoulos  
BBO #117760  
**DECOULOS & DECOULOS**  
Attorney for Defendant,  
Decoulos as Trustee,  
39 Cross Street, Suite 204  
Peabody, MA 01960  
Tel. 978/532-1020  
August 26, 2003

#### **CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the above document was served upon the attorney of record for each party, and upon any party appearing pro se, by first-class, postage prepaid mail.

Dated: 8/26/03

## APPENDIX P

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\* \* \*

[p.5] THE COURT: There's the supplemental --

MR. NICHOLAS DECOULOS: Oh, no, we're talking about the bad faith, and we discussed that at our pretrial conference. We're talking about the bad faith and also the next door of the abutting property. I wanted to bring them in to testify, and you said there was no need to do that, and I'll give you --

THE COURT: Let me just be clear, Mr. Decoulos. I do not think bad faith is an issue in this case.

MR. NICHOLAS DECOULOS: I know that.

THE COURT: Second, I do not think that what other property owners got in settlement is at all relevant. The settlement has nothing to do with value. So we're not going into that.

MR. NICHOLAS DECOULOS: But I'd like to put it into the record.

THE COURT: Well, you can certainly do that, and the motions you have -- and I now point out for the record, that to the extent that you want to offer evidence of other settlements, you want to offer evidence of bad faith, those are not issues that are properly before the jury in the case that is

designed only to determine what the just compensation is, and your rights with respect to that are saved.

MR. NICHOLAS DECOULOS: Yes. Well, I'd like to put it into the record.

\* \* \*

[p.9] MR. NICHOLAS DECOULOS: The question that will be asked of me is what negotiations did you have with the Maritime officials before the taking in as far as the settlement is concerned, which included an offer of money on the part of Maritime, and also a refusal on the part of Maritime to amend the grant of easement that they were looking for. They gave me a grant of easement.

What I would want to do, your Honor, just for the sake of saving time here, I have an affidavit that's attached to my motion in limine to exclude evidence. This is my opposition to support the denial to exclude evidence in an act of alleged bad faith. If you want me to, I will read it into the record.

THE COURT: You don't have to read it into the record. It's already part of the record. Isn't it a document in the case?

MR. NICHOLAS DECOULOS: Yes, but it was attached-

THE COURT: I don't know why it wouldn't be part of the record in the case, and you're now referencing it into this offer of proof.

MR. NICHOLAS DECOULOS: Because it's attached to my memorandum, and I don't want somebody to say, in the event the matter is appealed, that memorandums are not permitted as part of the record.

THE COURT : Well, affidavits may be.

[p.10] MR. NICHOLAS DECOULOS : I'd like to -- as long as I can include this into the record, I have no problem with that.

THE COURT: The affidavit is part of that record, I have just included it. It is Mr. Decoulos' affidavit, correct?

MR. NICHOLAS DECOULOS: Yes.

THE COURT: Attached to his memorandum in opposition to what, Mr. Decoulos?

MR. NICHOLAS DECOULOS: This is the defendants' affidavit to support denial of the plaintiff's motion in limine to exclude evidence regarding alleged bad faith.

THE COURT: When was it filed?

MR. NICHOLAS DECOULOS: I was just going to give you the date. I don't know when it was filed. I have a date on -- my affidavit is dated August 26, 2003. And attached to that affidavit was an annotation of the easement agreements, and I would also want to include into the record --

THE COURT: Okay. The affidavit, if I'm correct, is number 61 on the docket. It is described as affidavit of Nicholas Decoulos re: response to motion by Nicholas Decoulos, which is response to the motion in limine to exclude evidence regarding alleged bad faith. That's what you're talking about.

MR. NICHOLAS DECOULOS: Yes.

THE COURT: So the affidavit is number 61. It is part of the record of the case.

MR. NICHOLAS DECOULOS: And then I have a [p.11] supplemental affidavit for my motion to reconsider to exclude evidence regarding alleged bad faith.

THE COURT: Number 66 on the docket.

MR. NICHOLAS DECOULOS: And that's dated November 7, 2003.

THE COURT: Filed on November 10th.

MR. NICHOLAS DECOULOS: And I would also to include - and I hope it's part of the affidavit, I just don't want to clutter up the record -- not clutter it up, but I have the business records of the Willowdale Realty Trust that are from pages -- and this was on -- these were all done -- I've got to stop some place -- I have pages 1 through 101 A were the records of the Willowdale Realty Trust, which started on December 12, 2001 when the representatives of Maritime visited me, and up to the time that the letter and my response to the offer made by Maritime in May of 2002, which preceded the filing of the complaint. I have a letter -- up to 2002 and then I have them numbered in pages up to 101, I think they're already there, Judge. I just want to make sure.

I also want to include the documents which I got copies of from the registries of deeds in Lawrence that were grants of easements given by landowners to Maritime, which contradict what Mr Gessner told me that they don't do these I particular things, that the only thing you're going to sign is the one that we give you on May 23 or out the door -- or May - [p.12] let me give you the exact date of that. May 10, 2002. And he

attached a proposed grant easement in his letter, and that's part of the record.

So we would also include the grants of location and license agreements that were recorded beginning in -- up at the Lawrence registry of deeds with a document that's dated November 8, 1998 and is recorded at book 5232, page 290 and goes on to other grants of easements down at the registry of deeds in Salem. And the last one being July 26, 2002 Costco Wholesale Company to Maritime. And in those documents, I would outline all of the conditions that Costco got and all of the other people that were different than what I was told I had to sign to resolve the case.

So that my intention would be, just for the record I'm saying this, Judge, that they didn't treat me with due process and equal protection when they hand -- when they did that.

Now, there's also what I want to include in the record when I first started -- when they first notified that I might have -- that the property that we have would be subject to an easement. I got a notification from the Federal Energy Regulatory Commission about an interstate natural gas facility on my land, what do I need to know? And then I got from Maritime requirements for construction on and near company facilities, and that is dated 8/24/98. And then I also got [p.13] another communication from Maritime that's not dated, an information for landowners who have the Maritimes & Northeast Pipeline, LLC right of way on their property. That's an undated document.

So I would include those in my offer of proof.

And then in my supplemental joint pretrial memorandum, your Honor, which I presented to you at the pretrial

conference, I wanted to summons in or subpoena the records of the 262 Andover Street Realty -- excuse me, 260 Andover Realty Trust. I have to check my -- just one second, I have to make sure I'm saying the right -- giving you the right number.

I wanted to have the testimony of Nicholas Decoulos, William F. Garland, and Peter A. Pantazelos, as they are the trustees of the 260 Andover Realty Trust as they are the abutters, and the managing agent, Daniel Corbett, and their attorney is James M. Cote.

THE COURT: C-o-t-e.

MR. NICOLAS DECOULOS: Yes, C-o-t-e, thank you, your Honor. This would be a questioning of them and me -- they would testify to the similarities of the properties owned by the 260 Andover Realty Trust and the present -- the case that's before the Court.

THE COURT: That other case was settled, right? There was not a court decision as to what is the amount of just [p.14]compensation.

MR. NICHOLAS DECOULOS: That's right. And I wanted to bring them in to find out what that just compensation was, and you said there's no need to bring them in.

THE COURT: That's correct, because it's not admissible, in my view.

MR. NICHOLAS DECOULOS: Pardon me?

THE COURT: It is not admissible in my view.

MR. NICHOLAS DECOULOS: I understand.

THE COURT: Because it's a settlement amount.

MR. NICHOLAS DECOULOS: I understand. And I would -- I was going to have the negotiations and settlement of the claims set forth in the case of Maritimes against 2.185 Acres, that's how they've described the abutting property.

And we would also, together with any documents executed by the parties in that case in the settlement of the case, and you just ruled it again, that it's not admissible.

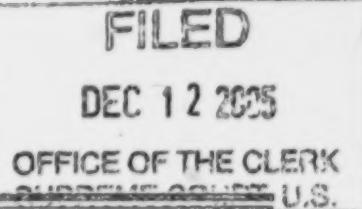
So that those documents, your Honor, all of those documents that I've talked about in my affidavits and also the documents that I created while I was representing the 260 Andover Street Realty Trust I wanted to introduce into evidence, and as a result of your ruling I can't do it, and that's the reason for the offer of proof.

THE COURT: Okay. Now, apart from that, who will your witnesses be?

\* \* \*

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No. 05-614



IN THE  
**Supreme Court of the United States**

NICHOLAS J. DECOULOS,  
Trustee of Willowdale Realty Trust,

*Petitioner,*

v.

MARITIMES & NORTHEAST PIPELINE, L.L.C.,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

**BRIEF IN OPPOSITION**

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## **QUESTION PRESENTED FOR REVIEW**

Respondent believes that the question presented for review is more properly stated as:

Consistent with the unambiguous language in the Natural Gas Act (15 U.S.C. § 717f(h)), did the First Circuit correctly hold that a natural gas company is not required to negotiate in good faith with a landowner prior to commencing a condemnation action?

## **CORPORATE DISCLOSURE STATEMENT**

Respondent Maritimes & Northeast Pipeline, L.L.C. is a limited liability company with the following member corporations, some of which have issued shares to the public:

- a. M & N Management Company (a wholly-owned subsidiary of Duke Energy Gas Transmission, LLC, which is an indirect, wholly-owned subsidiary of Duke Energy Corporation, a publicly-traded company);
- b. Westcoast Energy (U.S.) LLC (a wholly-owned subsidiary of Westcoast Energy Enterprises (U.S.), Inc., which is a wholly-owned subsidiary of Duke Energy Gas Transmission, LLC, which is an indirect, wholly-owned subsidiary of Duke Energy Corporation, a publicly-traded company);
- c. Mobil Midstream Natural Gas Investments, Inc. (a wholly-owned subsidiary of Mobil Oil Corporation, which is a wholly-owned subsidiary of ExxonMobil Corporation); and
- d. Scotia Power U.S., Ltd. (a wholly-owned subsidiary of Emera, Inc.).

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Respondent Maritimes & Northeast Pipeline, L.L.C. ("Maritimes") files its Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner Nicholas J. Decoulos, as Trustee of Willowdale Realty Trust. The First Circuit characterized Decoulos' appeal as "frivolous." App. 7a.<sup>1</sup> For the reasons set forth below, Maritimes requests that the petition for certiorari be denied.

### **STATEMENT OF THE CASE**

This matter arises out of a condemnation action instituted in the United States District Court for the District of Massachusetts by Maritimes pursuant to the Natural Gas Act ("NGA"). 15 U.S.C. § 717f(h).

#### **I. FERC Certifies Maritimes' Pipeline Project**

Before a natural gas company can construct and operate a natural gas transmission pipeline and related facilities, the company must obtain a Certificate of Public Convenience and Necessity ("Certificate") from the Federal Energy Regulatory Commission ("FERC"). 15 U.S.C. § 717f(c). Maritimes is a natural gas company as defined by the NGA, 15 U.S.C. § 717a(6), because it transports natural gas in interstate commerce.

On December 21, 2001, FERC issued a Certificate to Maritimes authorizing, among other things, the construction, operation and maintenance of an underground natural gas pipeline and related facilities along a route that extended approximately 25 miles that began in Methuen, Massachusetts and

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1. All references herein to appendices are to the appendices attached to Decoulos' Petition for Writ of Certiorari.

passed through seven Massachusetts municipalities before ending in Salem, Massachusetts ("Phase III Pipeline Project"). *See* 97 FERC ¶ 61,345 (2001). That route involved installation of the pipeline on almost 300 properties.

## **II. Maritimes Offers Decoulos More Than Twice the Property's Appraised Value**

To construct the Phase III Pipeline Project in accordance with the FERC Certificate and along the approved alignment, Maritimes needed to acquire a permanent and temporary easement on property in Peabody, Massachusetts owned by Decoulos (the "Trust Property").

Over the course of several months prior to the filing of the condemnation action, Maritimes sought to purchase the necessary easement rights on the Trust Property. A Maritimes land agent met and spoke with Decoulos on numerous occasions in an attempt to purchase the easement rights. Maritimes' efforts to purchase the easement rights on the Trust Property culminated in a Final Offer Letter dated May 20, 2002, in which Maritimes offered to pay \$237,400 for the easement rights, which was more than twice its value according to an independent appraisal. App. 44a-46a. Decoulos rejected Maritimes' final offer. App. 60a. Thereafter, Maritimes filed the condemnation action to take the easements. That action was one of approximately 120 condemnation actions filed by Maritimes in the district court to condemn easements necessary for the installation of the Phase III Pipeline Project.

### **III. Proceedings in the District Court**

Shortly after filing the condemnation actions, Maritimes filed a Motion for Partial Summary Judgment and/or Immediate Entry in a number of cases asking the district court to confirm Maritimes' authority to take the necessary easements on all of the properties involved and issue an Order of Taking that Maritimes could record in the appropriate Registry of Deeds. Alternatively, Maritimes sought an order allowing it to immediately enter various properties so that it could begin construction of the pipeline. The district court granted Maritimes' motion for immediate entry, but deferred ruling on the motion for partial summary judgment. The district court judge subsequently recused himself.

After the case was reassigned to another judge, Maritimes renewed its motion for partial summary judgment. On February 12, 2003, the district court issued a Memorandum of Decision holding that Maritimes had the authority to take the permanent and temporary easements on the Trust Property. On April 9, 2003, after further briefing, the district court signed Maritimes' proposed Order of Taking. App. 62a-64a.

The issue of compensation for the taking of the easements on the Trust Property was then tried before a jury. During the trial, the parties settled on the amount of \$28,700 to be paid for the temporary easement. The jury determined that Decoulos was entitled to just compensation in the amount of \$68,063, exclusive of interest, for the permanent easement. Judgment for those amounts was entered on February 13, 2004. App. 8a-9a.

#### **IV. Decision of the First Circuit**

Decoulos raised four issues on appeal, only one of which is relevant here: whether Maritimes, prior to filing the condemnation action, was required to negotiate in good faith in an effort to acquire the easements on the Trust Property. App. 3a-4a. In a per curiam unpublished opinion, the First Circuit held that the NGA does not contain a good faith requirement, characterized Decoulos' arguments as "frivolous," and affirmed the district court's judgment. App. 1a-7a.

#### **REASONS FOR DENYING THE PETITION**

The First Circuit correctly ruled that the NGA does not require a natural gas company to negotiate in good faith with a landowner prior to commencing a condemnation action. Any other decision would have been contrary to the unambiguous language of the NGA. The NGA authorizes a natural gas company to take an easement or any other property right that is necessary to comply with the company's FERC Certificate when the company is unable to purchase the easement from the landowner. The NGA does not require a natural gas company to negotiate with a landowner prior to commencing a condemnation action and it would be inappropriate for any court to impose a requirement that the company must engage in such negotiations and do so in good faith. Adding that requirement to the statute would not only result in amending the NGA by judicial fiat, but it would also require district courts to devote scarce resources to policing negotiations between natural gas companies and landowners. Finally, Decoulos articulates no compelling reason for review by this Court. Sup. Ct. R. 10.

## **I. The First Circuit Correctly Ruled That the NGA Does Not Require a Natural Gas Company to Negotiate in Good Faith With a Landowner Before Commencing a Condemnation Action**

The NGA could not be clearer. A natural gas company may condemn property to construct a pipeline provided: (1) it obtains a Certificate of Public Convenience and Necessity authorizing the construction of the pipeline; (2) the use of a particular parcel of land is necessary to comply with the Certificate; and (3) it has been unable to agree with the landowner on the amount of compensation to be paid. Nonetheless, Decoulos maintains that the First Circuit erred when it decided that the NGA does not require a natural gas company to negotiate with a landowner in good faith prior to commencing a condemnation action. Decoulos' argument is not grounded in the statute and was properly rejected.

### **A. Maritimes Acted in Accordance With the NGA in Taking the Easements on the Trust Property**

Maritimes condemned the easement rights on the Trust Property pursuant to § 7(h) of the NGA. That section, in relevant part, states that

When any holder of a certificate of public convenience and necessity cannot acquire by contract, *or is unable to agree with the owner of property to the compensation to be paid for*, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way . . . it may acquire the same by the exercise of the

right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State Courts.

15 U.S.C. § 717f(h) (emphasis added).

Numerous courts construing Section 717f(h), like the district court in the instant case, have granted summary judgment where the natural gas company proved it had a Certificate, the property taken was necessary to comply with the Certificate, and it was unable to agree with the landowner on the amount of compensation to be paid. *E.g., Tennessee Gas Pipeline Co. v. Mass. Bay Transp. Auth.*, 2 F. Supp. 2d 106, 108-12 (D. Mass. 1998) (granting the pipeline company's motion for partial summary judgment on the issue of its authority to condemn after concluding that the company satisfied all three conditions); *see also Rivers Elec. Co. v. 4.6 Acres of Land in Town of Catskill*, 731 F. Supp. 83, 87 (S.D.N.Y. 1990) (granting partial summary judgment on the issue of authority of electric company to condemn property under the power of eminent domain conferred on the company by the Federal Power Act, 16 U.S.C. § 814, where the company held a license from FERC to construct a hydroelectric project); *Rivers Elec. Co. v. .9 Acres*, 1990 WL 52214 (S.D.N.Y. 1990) (same). *Compare Guardian Pipeline, L.L.C. v. 529.42 Acres of Land*, 210 F. Supp. 2d 971, 973-74 (N.D. Ill. 2002) (applying same three criteria to natural gas company's motion to confirm condemnation of easements).

It is well settled that the district court's function in respect to the taking of the necessary property rights "is limited to evaluating the scope of the FERC Certificate and ordering condemnation as authorized by that certificate."

*Guardian Pipeline, L.L.C. v. 529.42 Acres of Land*, 210 F. Supp. 2d at 974. This limitation is anchored in the equally settled rule that a FERC Certificate may not be collaterally attacked in a condemnation action. *Id.* at 975 (all objections to natural gas pipeline company's condemnation of land preempted as any such objections should have been raised with FERC or appropriate court of appeals); *see also Williams Natural Gas Co. v. Okla. City*, 890 F.2d 255, 263-64 (10th Cir. 1989) ("The eminent domain authority granted the district courts under . . . 15 U.S.C. 717f(h), does not provide challengers with an additional forum to attack the substance and validity of a FERC order. The district court's function under the [Natural Gas Act] is not appellate but, rather, to provide for enforcement"); *Portland Natural Gas Transmission System v. 4.83 Acres of Land*, 26 F. Supp. 2d 332, 334 n.1 (D.N.H. 1998) (district court in a condemnation action lacks jurisdiction to entertain any challenge to validity of a Certificate); *Tennessee Gas Pipeline Co.*, 2 F. Supp. 2d at 110 (district court's jurisdiction in an eminent domain action under the NGA extends only to examining the scope of the Certificate and ordering condemnation as authorized by the Certificate: "This Court's rule is one of mere enforcement."); *Kern River Gas Transmission Co. v. Clark County*, 757 F. Supp. 1110, 1116 (D. Nev. 1990) (landowner may not challenge FERC-approved pipeline route in an eminent domain proceeding arising under the NGA); *Tenn. Gas Pipeline Co. v. 104 Acres of Land, More or Less*, 749 F. Supp. 427, 430 (D.R.I. 1990) (challenges to a FERC Certificate can be raised only by rehearing/appeal of FERC Order and landowner may not challenge a FERC Certificate in an eminent domain action arising under the NGA).

In the instant case, the lower courts respected their limited role, as did the other courts cited above, and refused to transgress the boundaries of their authority under Section 717f(h).

It is undisputed in the instant case that all three statutory conditions were satisfied. *First*, as the holder of a FERC Certificate, Maritimes was authorized to exercise the federal power of eminent domain. *See USG Pipeline Company v. 1.74 Acres in Marion County, Tenn.*, 1 F. Supp. 2d 816, 825 (E.D. Tenn. 1998) (Certificate "cloaks" natural gas company "with power of eminent domain"). Hence, Maritimes had the unquestioned authority to condemn the permanent and temporary easements (or rights-of-way) on the Trust Property in order to "construct, operate, and maintain" its pipeline and "other . . . equipment necessary for the operation of the pipeline" when it was unable to purchase those easements from Decoulos.

*Second*, FERC had approved the route of the Phase III Pipeline Project, the size and location of the easements and the other matters relevant to construction and operation of the Phase III Pipeline Project. *Third*, it was undisputed that Maritimes was unable to acquire the easement rights from Decoulos by contract or agreement. As recounted above, and by the First Circuit, Maritimes' numerous efforts to purchase the necessary easement rights on the Trust Property, including a final offer letter where it offered compensation in excess of twice the appraised value, were rejected. App. 3a. Thus, consistent with the unambiguous language of the NGA, Maritimes satisfied its burden and was entitled to summary judgment and the Order of Taking.

## B. Decoulos' Argument Violates Statutory Construction Cannons

Decoulos seeks to craft a new requirement onto Section 717f(h) by requiring that the condemnor prove that it negotiated in good faith with a landowner. Although his argument is painted with a broad brush, Decoulos' particular complaint is that Maritimes' proposed easement referenced more than one pipeline and its proposed Certificate of Payment provided that the amount of compensation paid to Decoulos could not be recorded. Petition at 4, 6; App. 47a, 55a. Decoulos' good faith argument is not grounded in the NGA and in fact is contrary to the plain language of the NGA. As the First Circuit observed, "it is unclear to what Decoulos anchors his claim that good faith negotiations must precede the filing of the condemnation action, as the NGA contains no specific language to this effect." App. 5a. The First Circuit aptly commented that "[a]bsent any credible authority making good faith negotiations a requirement precedent to the condemnation action . . . we decline the invitation to create one in this case." *Id.* The First Circuit was correct to do so.

The preeminent canon of statutory interpretation requires a court to "presume that [the] legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). Thus, the inquiry begins with the statutory text, and ends there as well if the text is unambiguous. *Lamie v. United States Trustee*, 540 U.S. 526, 527-28 (2004).

Here, the statutory text requires only that the natural gas company and the landowner are unable to agree on the amount of compensation to be paid for the property rights sought. The natural gas company's obligation extends only to offering an amount as compensation for the property rights. It certainly does not require a company to negotiate the terms of an easement with the landowner. If the landowner does not accept the company's offer, then the company has to file a condemnation action to acquire the necessary easement rights. Therefore, provided the company offers an amount (here, the amount was more than twice the value reached by an independent appraiser) and the landowner rejects it, the "unable to agree" requirement is satisfied. A single offer from the condemnor, ignored or rejected by the landowner, satisfies the unable to agree requirement. On its face, the statute does not require any negotiations; *i.e.*, it does not require that the condemnor wait for a counter-offer or make a second, or third offer. Nor can a duty to negotiate about compensation or anything else, and to negotiate in good faith, be implied.

Decoulos' argument that a natural gas pipeline should be required to prove that it has negotiated in good faith as a condition to taking property has also been rejected by at least one district court. In *Kansas Pipeline Co. v. A 200 Foot by 250 Foot Piece of Land*, 210 F. Supp. 2d 1253 (D. Kan. 2002), the district court rejected a landowner's argument that the natural gas company failed to negotiate in good faith. The court explained that:

The plain language of the NGA does not impose an obligation on a holder of a FERC certificate to negotiate in good faith before acquiring land by exercise of eminent domain. . . . The statute only requires that the party seeking to condemn be

unable to acquire the property by contract or unable to agree on compensation to be paid for the property. The court declines to demand more than the statute requires by its terms.

*Id.* at 1257.

The Kansas district court further stated that its holding was "consistent with" this Court's decision in *National R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407 (1992) (holding that the ICC's decision that Amtrak did not have to show that it engaged in good faith negotiations to buy a property before seeking condemnation was "a reasonable interpretation of the phrase 'unable to agree upon terms for the sale'"). The Kansas district court noted that it was undisputed that the pipeline company offered to lease or purchase the property from the landowners who rejected both offers. *Id.* at 1258. That evidence was sufficient to satisfy the requirement that the pipeline be "unable to agree with the owner of property to the compensation to be paid for" the property. *Id.* Hence, the court held that the pipeline company had "satisfied the statutory requirements for condemnation and is entitled to summary judgment on this issue." *Id.* The First Circuit cited this Kansas decision. App. 5a. Decoulos ignores it.

This Court has stated that federal courts do not have the "authority to 'rewrite a statute and give it an effect altogether different' from what Congress agreed to." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 562 (2001); *see also Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 308 (4th Cir. 2000) (noting that "our job is to determine the meaning of the statute passed by Congress, not whether wisdom or logic suggests that Congress could have done better"); *United States v. Charles*

*George Trucking Co.*, 823 F.2d 685, 689 (1st Cir. 1987) (noting that "courts have no warrant to rewrite statute in the guise of 'interpretation'"). In short, Decoulos' argument requires the Court to rewrite section 717f(h) and thereby violate the preeminent canon of statutory interpretation.

### **C. Maritimes Negotiated in Good Faith with Decoulos**

Some district courts have discussed whether a natural gas company negotiated in good faith with a landowner. Those courts, however, never explained how they concluded that the company had an obligation to do so. Maritimes maintains that those cases were incorrectly decided. Moreover, it appears that those courts simply indulged the landowners' argument because it was so obvious that the company acted in good faith. Those courts also limited any duty to negotiate in good faith to the matter of compensation for the property rights in question. See *Transcontinental Gas Pipeline Co. v. 118 Acres of Land*, 745 F. Supp. 366, 369 (E.D. La. 1990) (natural gas company engaged in good faith negotiations with the owners of the land by communicating with each at least two times and making an offer for an easement equal to or greater than the appraised value as determined by the company's appraiser); *Tennessee Gas Pipeline Co. v. New England Power Co.*, 6 F. Supp. 2d 102, 105 (D. Mass. 1998) (ample evidence that pipeline company negotiated in good faith given its various offers to pay trailer owner's moving expenses); *USG Pipeline Co. v. 1.74 Acres in Marion County, Tennessee*, 1 F.Supp.2d at 821-24 (E.D. Tenn. 1998) (pipeline company satisfied its obligation under the NGA where it engaged in negotiations with landowners over six months and made monetary offers it considered reasonable); *Kern River Gas Transmission Company v. Clark County*, 757 F. Supp. at 1113 (holding that natural gas

company had engaged in good faith negotiations where the parties had negotiated for several months prior to commencement of condemnation action).

If Maritimes had an obligation to negotiate in good faith with Decoulos, it clearly did so. First, Maritimes engaged in substantial negotiations with Decoulos in an effort to purchase the necessary easement rights prior to filing the condemnation action. Second, Maritimes had an appraisal of the fair market value of the easements performed by an independent, licensed Massachusetts real estate appraiser. Third, Maritimes offered to pay Decoulos an amount that was greater than the appraised amount of such easement rights.

Hence, as matter of law, Decoulos' argument is untenable and, as a matter of fact, his argument is a fiction.

## **II. Decoulos' Cases Are Inapposite**

To gain a toehold, Decoulos attempts to manufacture a conflict. Petition at 5-6. He first argues Federal Rule of Civil Procedure 71A(h) as construed by this Court requires the trial judge to decide all issues, legal and factual, that may be presented, except for compensation. Petition at 6 (citing *United States v. Reynolds*, 397 U.S. 14 (1970)). The issue in *Reynolds* was whether the "scope-of-the-project" question is to be determined by the trial judge or by the jury. *Id.* at 20. It is unclear whether Decoulos is arguing that the judge or the jury should decide the issue of good faith, or whether he even has an opinion on that issue. In any event, his argument fails because it erroneously presumes that good faith negotiation is an issue under the statute. Since it is not, there is nothing for the judge, as distinct from the jury (or vice-versa), to resolve.

Second, Decoulos relies on *United States v. Carmack*, 329 U.S. 230 (1946), where this Court discussed good faith in the context of the selection of a site for a post office. Nothing in *Carmack* remotely suggests a condemner must act in good faith when negotiating compensation with the landowner or even negotiate at all.

The lower court decisions on which Decoulos relies are equally unavailing. Rather, Decoulos' argument simply consists of cherry picking statements from some cases that are light years away from the instant case. His cases either involved challenges to the authority of an administrative agency of the United States to take property or raised an issue as to whether the taking involved a public use. Petition at 7-8. But under the NGA, the issue of whether the natural gas company has the authority to take the property interest is vested in FERC and immune from judicial review. Unlike the cases Decoulos relies upon, FERC has the final word. Thus, to the extent Decoulos' cases are still good law, they only suggest that a court may review the decision of a federal administrative agency to condemn the property in question in very limited circumstances. They do not in any way suggest that the federal government is obligated to negotiate or negotiate in good faith with landowners before taking their property. Therefore, the cases cited by Decoulos do not support his argument that the NGA allowed the district court to examine the propriety of Maritimes' taking.

With respect to Decoulos' particular claims (that Maritimes proposed easement referenced multiple pipelines and that the Certificate of Payment provided that it should not be recorded), he again cites no case in which a court has even suggested that a natural gas company is obligated by the NGA to negotiate the terms that are to be included in a

grant of easement or any other type of agreement with a landowner before the company can condemn the easement or any other property interest. Moreover, since Maritimes only offered to purchase easement rights on certain conditions, Decoulos was free to reject Maritimes' proposal and that he did. It is incomprehensible how that shows that Maritimes acted in bad faith and harmed Decoulos.

### **III. Imposing a Duty of Good Faith Negotiations as a Precondition to Condemnation Would Open a Pandora's Box.**

Assuming that a court could even do so, there are myriad compelling reasons why a good faith negotiation requirement should not be added to the NGA. First, landowners do not need the protection of a good faith duty. The statute as written protects landowners. If a landowner is dissatisfied with the company's offer, he can simply await his day in court and try to prove the amount he believes he is owed.<sup>2</sup> The company has a substantial incentive to make a reasonable offer to a landowner in order to avoid the costs and hassle associated with a condemnation proceeding. Furthermore, such a requirement would give landowners unfair leverage over the pipeline company.

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2. FERC determined that the route of the Phase III Pipeline Project would traverse Decoulos' property. If Decoulos wanted to challenge the decision to put the pipeline on his property, he could have sought a rehearing of FERC's determination and then taken an appeal to the D.C. Circuit or the First Circuit. *See* 15 U.S.C. § 717f(a)-(b). But since Decoulos never did that, Maritimes' FERC Certificate was immune to attack in the district court. *See, e.g., Tenn. Gas Pipeline*, 2 F. Supp. 2d at 210 (discussing statutory framework for challenging a FERC decision). His attempt to create an end run around Section 717f(h) should not be countenanced.

Specifically, if the law were as Decoulos advocated, a public pipeline project could be held hostage to the desires of a single landowner. Any landowner who wanted to hold up a pipeline project or to be paid more money than the pipeline company was offering would need only to claim insufficient negotiations or lack of good faith and the district court would then have to engage in extensive fact-finding. (Many pipeline projects affect hundreds and even thousands of landowners.) In the interim, the pipeline company might be unable to proceed with construction, thereby delaying the pipeline project and costing the pipeline company money that it would not be able to recover. Such a delay would not merely inconvenience the company; it could cause a substantial delay in the delivery of much needed fuel to numerous residents and businesses. Imposing a judicially-created requirement of good faith could also further drain scarce judicial resources by involving district courts (and presumably juries) in reviewing pre-condemnation negotiations.

Landowners should not be able to convert the unable to agree requirement into a minefield that the natural gas company must navigate with the hope that it will step on one of the mines. To activate these mines, a landowner may: (1) seek to drag out negotiations by being unavailable or by requesting voluminous materials from the company; (2) refuse to respond to the company's offer; or (3) fail to communicate complaints about an offer at the time it is made, but rather "lay behind the log," and then raise complaints for the first time after the company files suit in the hope that the company will be inclined to pay the landowner settlement damages above its offer and above fair market value. Hence, crafting a duty to negotiate in good faith could lead to a host of problems.

Finally, adding a duty of good faith also raises many procedural issues unanswered by Decoulos. For example, if the court found a lack of good faith on the part of the pipeline company, what would be an appropriate remedy? Would the pipeline company have to begin negotiations again? Also, what if the landowner failed to negotiate in good faith and thereby delayed construction of a pipeline? Would the pipeline company have a remedy against the landowner? It is neither prudent nor good policy to police negotiations when a trial can always resolve the amount of compensation the landowner is owed. In sum, it is obvious that adding a good faith negotiation requirement is fraught with danger: it could delay the distribution of much needed natural gas, strain scarce judicial resources, create novel issues of law and in the end be inefficient and uneconomical.

## CONCLUSION

For the foregoing reasons, this Court should deny the petition for the writ of certiorari.

Respectfully submitted,

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